(21,274.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 210.

DELIA MOFFITT AND DELIA MOFFITT, EXECUTRIX, AND JAMES K. MOFFITT AND HERBERT C. MOFFITT, EXECUTORS OF THE WILL OF JAMES MOFFITT, DECEASED, PLAINTIFFS IN ERROR,

vs.

M. J. KELLY, TREASURER OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1909.

1 *Writ of Error.*

In the Matter of the Estate of JAMES MOFFITT, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the above entitled matter, in the Supreme Court of the State of California, before you on the 20th day of April, 1908, and the 20th day of May, 1908, at the San Francisco session of said court, and said court being the highest court of law and equity of said State in which a decision could be had in the said matter, wherein Delia Moffitt and Delia Moffitt as executrix, and James K. Moffitt and Herbert C. Moffitt as executors were appellants, and the County Treasurer of Alameda County was respondent, and wherein was drawn in question the validity of authority exercised under said State, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said court was in favor of the validity of such authority, and the decision was against the right, title, privilege or exemption set up and claimed under the said Constitution; a manifest error hath happened to the great damage of the said Delia Moffitt and the said Delia Moffitt as executrix, and James K. Moffitt and Herbert C. Moffitt as executors

2 of the will of James Moffitt, deceased, as by the petition for writ of error and the record in said matter fully appears.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 2nd day of July, in the Year of our Lord One thousand Nine hundred and Eight.

Done in the City and County of San Francisco, with the seal of the Circuit Court of the United States for the District of *Columbia* attached.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

Allowed by:

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

2½ I hereby acknowledge due service and receipt of a copy of the within Writ of Error this 2nd day of July, 1908.

U. S. WEBB,
Attorney General for the State of California.

Service admitted July 3, 1908.

CHAS. E. SNOOK &
L. S. CHURCH,
Attorneys for M. J. Kelly, Def't in Error.

[Endorsed:] 4896. Original. In the Matter of the Estate of James Moffitt, Deceased. Writ of Error with admission of service. Filed Jul- 7, 1908. F. L. Caughey, Clerk, by Erb, Deputy. Olney, Pringle & Mannon. Olney & Olney, Attorneys at Law, 1236 Merchants' Exchange Building, San Francisco, Cal.

3 *Citation.*

In the Matter of the Estate of JAMES MOFFITT, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to M. J. Kelly, Treasurer of the County of Alameda, State of California:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof, pursuant to writ of error filed in the office of the Clerk of the Supreme Court of the State of California, in the matter of the Estate of James Moffitt, deceased, wherein Delia Moffitt and Delia Moffitt as executrix, and James K. Moffitt and Herbert C. Moffitt as executors of the will of James Moffitt, deceased, are designated as plaintiffs in error, and you are defendant in error, to show cause if any there be why the judgment rendered in the said matter as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of California this first day of July, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By I. ERB,
Deputy Clerk.

4 STATE OF CALIFORNIA,
County of Alameda:

I, the undersigned, attorney- of record for M. J. Kelly, County Treasurer of Alameda County, California, defendant in error in the above entitled proceeding, hereby acknowledge due service of the above citation and copies of the following documents, to wit:

1. Petition for Writ of Error.
2. Allowance of Writ.
3. Assignment of Error on Writ of Error.
4. Bond on Writ of Error, and
5. Writ of Error.

Dated July 3, 1908.

CHAS. E. SNOOK,
906 *Broadway Street, Oakland, California.*
L. S. CHURCH,
906 *Broadway Street, Oakland, California.*

I, U. S. Webb, Attorney General of the State of California, hereby acknowledge due service of the above citation and of copies of the following documents, to wit:

1. Petition for Writ of Error.
2. Allowance of Writ.
3. Assignment of Error on Writ of Error.
4. Bond on Writ of Error.
5. Writ of Error.

Dated July 2, 1908.

U. S. WEBB,
Attorney General for the State of California.

4½ [Endorsed:] 4896. Original. In the Matter of the Estate of James Moffitt, Deceased. Citation with admission of service. Filed Jul- 7. 1908. F. L. Caughey, Clerk, by Erb, Deputy. Olney, Pringle & Mannon. Olney & Olney, Attorneys at Law, 1236 Merchants' Exchange Building, San Francisco, Cal.

5 In the Supreme Court of the State of California.

No. 4896.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Petition for Writ of Error to the Supreme Court.

Now come Delia Moffitt, the surviving wife of James Moffitt, deceased, and Delia Moffitt, as Executrix, and James K. Moffitt and Herbert C. Moffitt, as Executors of the Will of James Moffitt, deceased, and say:

That on the 20th day of April, 1908, judgment in the above entitled matter was rendered by this Court affirming the judgment of the Court below ordering the said Executrix and Executors of the

Will of James Moffitt, deceased, and Delia Moffitt, the surviving wife of said deceased, to pay the sum of $26,684.57 as an inheritance tax on the one-half of the community property belonging to Delia Moffitt as the surviving wife of the community composed of her husband James Moffitt and herself.

Thereafter a petition for rehearing was filed presented, considered, and on the 20th day of May, 1908, said petition was denied by this Court, whereupon said judgment became final.

That said Delia Moffitt, as the surviving wife of the said James Moffitt, deceased, was and is aggrieved, and the said Executrix and Executors were and are aggrieved in that in said judgment and the proceedings had prior thereto in this matter certain errors
6 were committed to their prejudice. That is to say, the said James Moffitt, deceased, and his surviving wife Delia Moffitt, were residents of the State of California at the time of their marriage and ever since have been continuously such residents. All the estate of the said deceased and his surviving wife is the community property of himself and of said surviving wife. All the real property belonging to said estate was acquired subsequent to the marriage of said deceased to the said Delia Moffitt and prior to the first day of January, 1880, except certain parcels of real estate situate in the counties of Napa and Los Angeles. Part of the personal property belonging to said estate was also acquired before January 1, 1880. The real property acquired before January 1, 1880, was appraised for the purpose of assessing an inheritance tax in the Court below at the sum of $814,108.50, and the personal property acquired by said community before January 1, 1880, was appraised at the sum of $203,062.50. There was not sufficient evidence available at the time of the hearing in the Court below to determine whether the property belonging to said estate that was acquired subsequent to January 1, 1880, was acquired with the rents, issues and profits of property acquired before that date, or is the proceeds of community earnings subsequent to said date.

The said Delia Moffitt as the surviving wife, and the said Executrix and Executors of the Will of James Moffitt deceased, invoked, as against the imposition of said inheritance tax, the protection of the Constitution of the United States, to wit: Article I, Section 10 thereof, and Article XIV, Section 2 thereof, and claimed that as all the property of the deceased was the community property of himself and wife, the said surviving wife succeeded on the death of
7 her husband to one-half thereof under the Constitution and laws of the State of California in force at the time of her marriage and at the time said property was acquired, not as the heir of her husband but because she had a vested interest therein, and no tax could be imposed by the State of California in the nature of an inheritance tax. The said Delia Moffitt, as surviving wife, and the said Executrix and Executors claim that "by virtue of the law in "force at the time she married her husband, and which has been "in force ever since, she had a vested interest in the property of the "community. On the death of her husband one-half of this property "became hers absolutely by virtue of the law in force at the time she

"helped to acquire it. It is therefore absolutely hers and is not sub-
"ject to any other taxes than such taxes as are imposed upon all
"property by the general laws of the state." The decision of this Court was against said right claimed by the said Delia Moffitt and the said Executrix and Executors under the Constitution of the United States, this Court holding that the wife has no vested interest in the community property of herself and her husband, all of which will more fully appear in detail from the Assignment of Errors filed herein and from the record of said cause.

Wherefore said Delia Moffitt and the said Executrix and Executors pray that a writ of error may issue to the Supreme Court of the State of California for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

WARREN OLNEY,
ONLY & OLNEY,
J. M. MANNON, JR.,
Attorneys for Delia Moffitt, and for Delia Moffitt as Executrix, and James K. Moffitt and Herbert C. Moffitt, as Executors of the Will of James Moffitt, Deceased.

8 In the Supreme Court of the United States.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Assignment of Error on Writ of Error to State Court.

Come now the Plaintiffs in Error, to wit: Delia Moffitt, the surviving wife of James Moffitt, deceased, and Delia Moffitt, the Executrix, and James K. Moffitt and Herbert C. Moffitt, the Executors of the Will of James Moffitt, deceased, and aver and show that in the record and proceedings in said matter or cause the Supreme Court of the State of California erred to the grievous injury and wrong of the said plaintiffs in error herein, and to the prejudice and against the rights of the plaintiff in error Delia Moffitt, in the following particulars, to wit:

1. The Supreme Court of the State of California erred in holding and deciding that Delia Moffitt, the surviving wife of James Moffitt, deceased, did not have a vested interest or right in the community property of herself and her deceased husband.

2. The Supreme Court of the State of California erred in holding and deciding that under the Constitution and laws of the State of California, and particularly the Constitution and laws of the State of California as they existed up to the first day of January, 1880, the wife, upon the death of the husband, succeeded to an interest in the community property as the heir of her husband and not by reason of any vested right she might have in said property by reason of
9 the same having been acquired during the existence of the community.

3. The Supreme Court of the State of California erred in holding and deciding that the interest of the wife in the community property under the Constitution and laws of the State of California was not a vested interest, but that on the death of the husband whatever interest in the community property came to her was as an inheritance from her husband.

4. The Supreme Court of the State of California erred in holding and deciding that an inheritance tax imposed upon the interest of the wife in the community property on the death of her husband is not in conflict with those provisions of the Constitution of the United States which declare that no state shall pass any law impairing the obligation of contracts, and that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, for the reason that the Constitution and the laws of the State of California, under which the property involved in this controversy was acquired, declare that all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property and that upon the death of the husband the wife shall succeed to the one-half of said community property, the other half going to his heirs or subject to his disposition by will.

5. The Supreme Court of the State of California erred in not reversing the order and judgment of the Superior Court of Alameda County in the matter of said estate and in not giving to Delia Moffitt the one-half of the community property of herself and her deceased husband free from any inheritance tax imposed by the statutes of California upon estates derived from deceased owners.

10 Wherefore, for these and other manifest errors appearing in the record, the said Delia Moffitt in her own right as surviving wife, and the said Delia Moffitt, as Executrix of the Will of James Moffitt, deceased, and the said James K. Moffitt and Herbert C. Moffitt, as the Executors of the Will of James Moffitt, deceased, pray that the judgment and order of the said Supreme Court of California be reversed and set aside and held for naught, and that judgment be rendered in favor of plaintiffs in error and forbidding the collection of an inheritance tax upon the community property of herself and her deceased husband.

WARREN OLNEY,
J. M. MANNON, JR.,
1236 *Merchants Exchange Building, San Francisco, California, Attorneys for Plaintiffs in Error Above Named.*

11 In the Supreme Court of the State of California.

No. 4896.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Allowance of Writ of Error.

Now come Delia Moffitt, the surviving wife, and Delia Moffitt as Executrix, and James K. Moffitt and Herbert C. Moffitt, as Executors

of the Will of James Moffitt, deceased, on this 30th day of June, 1908, and file and present to this Court their petition for the allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question therein presented, it is ordered by this Court that a writ of error be allowed as prayed, provided, however, that the said Delia Moffitt, Delia Moffitt as Executrix, and James K. Moffitt and Herbert C. Moffitt, as Executors of the Will of James Moffitt, deceased, give bond according to law in the sum of ($500.00) Five Hundred Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 30th day of June, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

12 In the Supreme Court of the United States.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Bond on Writ of Error.

Know all men by these presents:

That we, Delia Moffitt, as principal, and Delia Moffitt, James K. Moffitt and Herbert C. Moffitt, as Executrix and Executors of the Will of James Moffitt, deceased, the first two named being of the County of Alameda, State of California, and Herbert C. Moffitt, being of the City and County of San Francisco, State of California, all as principals, and Warren Olney, of the County of Alameda, State of California, and James K. Lynch, of the City of Alameda, and County of Alameda, as sureties, are held and firmly bound unto the People of the State of California in the sum of Five Hundred Dollars, to be paid by them and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of June, in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas the above named Delia Moffitt, and Delia Moffitt and James K. Moffitt and Herbert C. Moffitt, as Executrix and Executors of the Will of James Moffitt, deceased, seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action or proceeding by the Supreme Court of the State of California,

13 Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

DELIA MOFFITT,
By J. K. MOFFITT,
Her Att'y in Fact.
HERBERT C. MOFFITT,
By J. K. MOFFITT,
His Att'y in Fact.
WARREN OLNEY.
JAMES K. LYNCH.

JAMES K. MOFFITT.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Warren Olney and James K. Lynch, whose names are subscribed as sureties to the above bond, being severally and duly sworn, each for himself says, that he is a resident and freeholder of the State of California, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities in property not by law exempt from execution in this State.

WARREN OLNEY.
JAMES K. LYNCH.

Subscribed and sworn to before me this 30th day of June, 1908.
My commission expires May 27, 1909.
[SEAL.] P. J. KENNEDY,
Notary Public in and for the City and County of San Francisco, State of California.

This bond approved this 1st day of July, 1908.
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

14 *Writ of Error.*

In the Matter of the Estate of JAMES MOFFITT, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the above entitled matter, in the Supreme Court of the State of California, before you on the 20th day of April, 1908, and the 20th day of May, 1908, at the San Francisco session of said court, and said court being the highest court of law and equity of said state in which a decision could be had in the said

matter, wherein Delia Moffitt and Delia Moffitt as executrix, and James K. Moffitt and Herbert C. Moffitt as executors were appellants, and the County Treasurer of Alameda County was respondent, and wherein was drawn in question the validity of authority exercised under said State, on the ground that said authority was repugnant to the Constitution of the United States, and the decision of said court was in favor of the validity of such authority and the decision was against the right, title, privilege or exemption set up and claimed under the said Constitution; a manifest error hath happened to the great damage of the said Delia Moffitt and the said Delia Moffitt as executrix, and James K. Moffitt and Herbert C. Moffitt as
15 executors of the will of James Moffitt, deceased, as by the petition for writ of error and the record in said matter fully appears.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July, in the Year of our Lord One Thousand Nine Hundred and Eight.

Done in the City and County of San Francisco, with the seal of the Circuit Court of the United States for the District of *Columbia* attached.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

Allowed by:
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

16 *Citation.*

In the Matter of the Estate of JAMES MOFFITT, Deceased.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to M. J. Kelly, Treasurer of the County of Alameda, State of California:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to writ of error filed

in the office of the Clerk of the Supreme Court of the State of California, in the matter of the Estate of James Moffitt, deceased, wherein Delia Moffitt and Delia Moffitt as Executrix, and James K. Moffitt and Herbert C. Moffitt as executors of the will of James Moffitt, deceased, are designated as plaintiffs in error, and you are defendant in error, to show cause if any there be why the judgment rendered in the said matter as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of California this first day of July, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attes

[SEAL.] F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By I. ERB, *Deputy Clerk.*

17 STATE OF CALIFORNIA,
County of Alameda:

I, the undersigned, attorney of record for M. J. Kelly, County Treasurer of Alameda County, California, defendant in error in the above entitled proceeding, hereby acknowledge due service of the above citation and of copies of the following documents, to wit:

1. Petition for Writ of Error.
2. Allowance of Writ.
3. Assignment of Error on Writ of Error.
4. Bond on Writ of Error, and
5. Writ of Error.

Dated July 3, 1908.

CHAS. E. SNOOK,
906 *Broadway Street, Oakland, California.*
L. S. CHURCH,
906 *Broadway Street, Oakland, California.*

I, U. S. Webb, Attorney General of the State of California, hereby acknowledge due service of the above citation and of copies of the following documents to wit:

1. Petition for Writ of Error.
2. Allowance of Writ.
3. Assignment of Error on Writ of Error.
4. Bond on Writ of Error.
5. Writ of Error.

W. S. WEBB,
Attorney General for the State of California.

Dated July 2, 1908.

18 [Endorsed:] In the Supreme Court of the State of California. In the Matter of the Estate of James Moffitt, Deceased. Copy of Petition for Writ of Error. Allowance of Writ. Assignment of Error on Writ of Error. Bond on Writ of Error. Writ of Error. Citation. Olney, Pringle & Mannon, Olney & Olney, attorneys at law, 1236 Merchants Exchange Building, San Francisco, Cal.

19 No. 4896.

In the Supreme Court of the State of California.

No. 10996. Dept. 4.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Transcript on Appeal from the Superior Court of the County of Alameda, State of California. T. W. Harris, Judge.

Olney & Olney, Attorneys for Appellants.
Snook & Church, Attorneys for Respondent.

Filed this — day of October, 1907.
FRANK L. CAUGHEY, *Clerk*,
By —— ——, *Deputy Clerk*.

20 In the Supreme Court of the State of California.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Transcript on Appeal by Widow and Executors from Order Directing Payment of Inheritance Tax.

In the Superior Court of the County of Alameda, State of California.

No. 10996. Dept. 4.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Order and Decree Fixing Collateral Inheritance Tax.

Geo. H. Richardson, heretofore appointed by the Court to appraise all inheritances, interests and property in said estate subject to collateral inheritance tax, having filed herein his written report and appraisement as such appraiser and the Court having fully considered the same,

21 It is Hereby Ordered:

First. That said report is in all respects confirmed;

Second. That the market value of all inheritances, devises and bequests and other interests in the matter of said estate subject to collateral inheritance tax to which the same are liable, be, and the same is hereby assessed and fixed as follows:

Name.	Relationship.	Market value above exemption.	Collateral inheritance tax.
Delia Moffitt	Widow	$995,319.00	$26,684.57
James K. Moffitt	Son	247,329.75	5,368.24
Herbert C. Moffitt	Son	247,329.75	5,368.24
Lucy Moffitt Lynch	Daughter	247,329.75	5,368.24
Alice Moffitt Doubleday	Daughter	247,329.75	5,368.24
		$1,984,638.00	$48,157.53

Third. That there will be interest due on said tax if not paid on or before the 25th day of April, 1908, a period of eighteen months from the date of the death of said deceased, at the rate of ten per cent per annum from the 25th day of October, 1906, the date of the death of said deceased.

It is Further Ordered that the Executors of the last Will and Testament of said deceased pay to the County Treasurer of Alameda County within thirty days from date hereof said collateral inheritance tax fixed at said sum of $48,157.53 and charge the same to the distributive share of said devise-s.

22 It is Further Ordered that said appraiser give notice hereof to all parties known to be interested herein.

Done in open Court this 4th day of October A. D. 1907.

(Signed) T. W. HARRIS,
Judge of the Superior Court.

Filed October 4, 1907.
Entered Oct. 11, 1907, Vol. 298, Probate Minutes, p. 130.

Bill of Exceptions to Order Directing Payment of Inheritance Tax.

[Title of Court and Cause.]

The Court having made and filed on the 4th day of October, 1907, an "Order and Decree Fixing Collateral Inheritance Tax," wherein and whereby the Court fixed the Collateral Inheritance Tax of Delia Moffitt, the widow of deceased, at the sum of $26,684.57, and directed the Executors of the Will of James Moffitt, deceased, to pay said tax, together with other taxes assessed against the inheritance of the children of said deceased, the said Delia Moffitt and the Executors of the Will of said deceased present the following as their bill of exceptions to the said Order, to wit:

James Moffitt, a resident of the County of Alameda, State
23 of California, died on the 25th day of October, 1906, leaving him surviving his wife, Delia Moffitt, and four adult children, to wit: James K. Moffitt, Herbert C. Moffitt, Lucy Moffitt Lynch, and Alice Moffitt Doubleday.

Said James Moffitt, deceased, and his widow Delia Moffitt were residents of the State of California at the time of their marriage and ever since have been such residents. All the estate of said deceased is the community property of himself and his wife (now widow) Delia Moffitt. All the real property belonging to said estate was ac-

quired subsequent to the marriage of said deceased to the said Delia Moffitt and prior to the first day of January, 1880, except certain parcels of real estate situate in the counties of Napa and Los Angeles. All the capital stock of the corporation Blake, Moffitt & Towne and Three Hundred and Twenty-five shares of the capital stock of the First National Bank of San Francisco were also acquired before January 1, 1880. The real estate acquired before January 1, 1880, is appraised by George H. Richardson, the duly appointed Appraiser as hereinafter stated, at the sum of $814,108.50, and the said stock acquired before said date is appraised by him at the sum of $203,062.50.

No sufficient evidence is available at the present time to determine whether the property belonging to said estate that was acquired subsequent to January 1, 1880, was acquired with the rents, issues
24 and profits of property acquired before that date or is the proceeds of community earnings subsequent to said date.

The said James Moffitt left a last Will and Testament, which by the judgment, order and decree of the Superior Court of Alameda County, duly given, made and entered on the 16th day of November, 1906, was admitted to probate and Letters Testamentary thereon were issued to Delia Moffitt as Executrix and James J. Moffitt and Herbert C. Moffitt as Executors. The said Will disposed of all of the estate of the said deceased to his wife and children in the same proportion as if he had died intestate.

The said Executrix and Executors duly qualified on said last mentioned day and entered upon the discharge of their duties and are still the duly appointed, qualified and acting Executrix and Executors of the Will of said James Moffitt, deceased.

On the same day the Court appointed J. M. Mannon, Jr., J. B. Lanktree and J. K. Lynch appraisers of the said estate.

Thereafter and on the 22nd day of April, 1907, the Executrix and Executors filed an Inventory and Appraisement of said estate, and in said Inventory and Appraisement all said property belonging to said estate was declared to be community property. The Inventory and Appraisement specifically described each separate parcel of real estate and valued the same, and contained a schedule of the
25 personal property, with the valuation of the same. That the total valuation of the estate of deceased appraised by said appraisers and stated in said Inventory was the sum of $1,883,626.23.

That immediately after the filing of said Inventory the said Executrix and Executors applied to the Court for an order fixing the Inheritance Tax to be paid on account of the inheritance of the said children of said deceased. Thereupon the Court refused to make an order fixing the tax until after the property had been appraised by a Special Appraiser, and on the 23rd day of April, 1907, the Court, against the objection and exceptions of the said Executrix and Executors, appointed George H. Richardson to appraise all inheritances, interests and property of the said estate subject to collateral inheritance tax and to make report thereon in writing to said Court.

Thereafter and on the 24th day of April, 1907, the said Executrix and Executors applied to the Court for leave to make a payment of

$18,000 on account of Inheritance Tax due from the said children of said deceased, and the Court on said day made an order permitting the said Executrix and Executors to pay the sum of $18,000 on account of said tax to the Treasurer of Alameda County, California, which payment was on said date made and the said estate is
26 entitled to a credit of the payment so paid on account of any Inheritance Tax thereafter assessed against said estate or children of said deceased.

Thereafter and on the 4th day of October, 1907, the said George H. Richardson, appraiser as aforesaid, filed his report, wherein and whereby he appraised the market value of all the estate of said deceased at the sum of $2,063,786.73. Said appraiser deducted from the value of the estate the costs and charges of administration, funeral expenses, executors' compensations and attorneys' fees, amounting to the sum of $53,148.72, leaving the net value of the estate the sum of $2,010,638.01.

On the coming in of said report the Court made an order in the words and figures following, to wit:

Order and Decree Fixing Collateral Inheritance Tax.

[Title of Court and Cause.]

George H. Richardson, heretofore appointed by the Court to appraise all inheritances, interests and property in said estate subject to collateral inheritance tax, having filed herein his written report and appraisement as such appraiser and the Court having fully considered the same,

It is Hereby Ordered:

First. That said report is in all respects confirmed;

27 Second. That the market value of all inheritances, devises and bequests and other interests in the matter of said estate subject to collateral inheritance tax to which the same are liable, be, and the same is hereby assessed and fixed as follows:

Name.	Relationship.	Market value above exemption.	Collateral inheritance tax.
Delia Moffitt	Widow	$995,319.00	$26,684.57
James K. Moffitt	Son	247,329.75	5,368.24
Herbert C. Moffitt	Son	247,329.75	5,368.24
Lucy Moffitt Lynch	Daughter	247,329 75	5,368.24
Alice Moffitt Doubleday	Daughter	247,329.75	5,368.24
		$1,984,638.00	$48,157.53

Third. That there will be interest due on said tax if not paid on or before the 25th day of April, 1908, a period of eighteen months from the date of the death of said deceased, at the rate of ten per cent per annum from the 25th day of October, 1906, the date of the death of said deceased.

It is Further Ordered that the Executors of the last Will and Testament of said deceased pay to the County Treasurer of Alameda

County within thirty days from date hereof said collateral inheritance tax fixed at said sum of $48,157.53 and charge the same to the distributive share of said devisees.

It is Further Ordered that said appraiser give notice hereof to all parties known to be interested herein.

28 Done in open Court this 4th day of October, A. D. 1907.

(Signed) T. W. HARRIS,
Judge of the Superior Court.

The said Delia Moffitt, the surviving wife of said deceased, and said Executrix and Executors duly excepted to said Order and Decree in so far as it directed the Executors of the Will of said deceased to pay the sum of $26,684.57, or any sum whatever, on account of the Inheritance Tax assessed against the said Delia Moffitt. That is to say—the said Delia Moffitt, as the surviving wife of said deceased, and the said Executrix and Executors duly excepted to said Order and Decree and every part thereof, save that portion thereof fixing the Inheritance Tax of the children of said deceased, and the said Delia Moffitt and the said Executrix and Executors pray that the foregoing be settled as their Bill of Exceptions to said Order and Decree.

OLNEY & OLNEY,
Attorneys for Delia Moffitt, Widow, and Delia Moffitt, James K. Moffitt, and Herbert C. Moffitt, Executrix and Executors of the Will of James Moffitt, Deceased.

The foregoing Bill of Exceptions is correct.

SNOOK & CHURCH,
Attorneys for M. J. Kelly, County Treasurer of the County of Alameda, State of California.

29 The foregoing Bill of Exceptions was presented in due time and is settled and allowed this 8th day of October, 1907.

T. W. HARRIS,
Judge of the Superior Court.

Duly filed October 8, 1907.

Notice of Appeal from Order Directing Payment of Inheritance Tax.

[Title of Court and Cause.]

You and each of you will please take notice that Delia Moffitt, the surviving wife, and Delia Moffitt, Executrix, and James K. Moffitt and Herbert C. Moffitt, Executors of the Will of James Moffitt, deceased, hereby appeal to the Supreme Court of the State of California from the order and judgment made by the Superior Court of Alameda County in the matter of said estate on the 4th day of October, 1907, ordering the said Executrix and Executors and the said surviving wife of said deceased, to pay the sum of $26,684.57 inherit-

ance tax on the share of the estate of said deceased belonging to Delia Moffitt, his surviving wife.

To M. J. Kelly, Treasurer of the County of Alameda, State of California, and Messrs. Snook & Church, his attorneys.

30 To John P. Cook, County Clerk and ex-officio Clerk of the Superior Court of the County of Alameda, State of California.

OLNEY & OLNEY,

Attorneys for Delia Moffitt, Surviving Wife, and Delia Moffitt, Executrix; James K. Moffitt and Herbert C. Moffitt, Executors, of the Will of James Moffitt, Deceased.

Dated October 11, 1907.

Duly served and filed October 11, 1907.

Stipulation.

It is Hereby Stipulated that the foregoing shall constitute the Transcript on Appeal and that said Transcript contains a true copy of the Order of the Court directing payment of Inheritance Tax, a true copy of the Bill of Exceptions filed by the Appellants, and a true copy of the Notice of Appeal, and that no other documents relating to said estate are necessary for the determination of the questions raised by said appeal.

It is Further Stipulated that a Bond on Appeal is and has been waived.

OLNEY & OLNEY,
Attorneys for Appellants.
SNOOK & CHURCH,
Attorneys for M. J. Kelly, Treasurer of the County of Alameda, State of California.

31 Endorsed: Filed April 20, 1908. F. L. Caughey, Clerk, by I. Erb, Deputy.

S. F. No. 4896. In Bank. April 20, 1908.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Collateral Inheritance Tax—Surviving Wife's Share of Community Property Subject to.—The surviving wife's share of the community property is subject to the inheritance tax provided by the inheritance tax law, approved March 20, 1905.

Id.—Community Property—Wife's Share Upon Death of Husband—Takes as Heir of Husband.—Upon the death of the husband the wife takes one-half of the community property as heir of the husband.

Id.—Acts of Legislature—Construction—Presumption as to Existing Judicial Decisions.—A familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it.

Appeal from the Superior Court of Alameda County. T. W. Harris, Judge.

For Appellants—Warren Olney, Olney & Olney.
For Respondent—Snook & Church.

This is an appeal by the widow and the executors of the will of the deceased from an order and decree made by the superior court of Alameda county in probate, directing the executors to pay to the county treasurer of Alameda county the sum of $26,684.50 as the inheritance tax upon the interest of the widow in the community property of herself and her deceased husband. The inheritance tax law of this state, approved March 20, 1905, prescribes that "All property which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same * * * shall be and is subject to a tax hereinafter provided for." The single question presented by this appeal is whether the surviving wife's share of the community property is subject to this inheritance tax.

It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of *In re Burdick*, 112 Cal. 387; *Spreckles* v. *Spreckles*, 116 Cal. 339, and *Sharp* v. *Loupe*, 120 Cal. 89. But it is earnestly contended that this court should overrule these cases to the extent of holding that as to the community property the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife during the existence of the marriage status has always enjoyed an ownership in one-half of the community property and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it with which the law during his lifetime and during the existence of the marriage status has clothed him. Reference is made to the language of the Civil Code (sec. 682) which declares that ownership of property by several persons is either: 1. Of joint interest; 2. Of partnership interest; 3. Of interests in common; 4. Community interest of husband and wife. We are referred also to expressions in some of the earlier decisions of this court, such
32 as the language of *Beard v. Knox*, 5 Cal. 256, where it is said: "The husband and a wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite and certain interest, which becomes absolute at his death."

All of these code sections, all of these cases and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *Godey* v. *Godey*, 39 Cal. 157. In that case

it is said that while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy * * * it is at the same time, * * * so vested in her that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it.'"

After painstaking investigation and review, and after the fullest deliberation, this court in *In re Burdick* determined and held, as it declared in *Spreckels* v. *Spreckels*, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into and what a complete disposition was made of them.

It is finally urged that as laws imposing inheritance taxes are subject to strict construction, and that as it could not have been in the legislative mind that by this act they were imposing a tax upon the widow's share of the community property, therefore a construction should be sought which will avoid this harsh result. But a familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it. Thus the legislature is presumed to have enacted it with full knowledge that this court in bank, not once but repeatedly had declared that the wife did take her share of the community property upon the death of her husband by succession as his heir. The next and necessary presumption that follows is that the legislature enacted the inheritance tax law in the light of these decisions and to the end that the widow's share of the community property should bear this tax quite as much as would the portion of the husband's separate estate which might come to her by will or by the laws of succession. In other words, since the legislature knew that the latest expression from this court upon the subject was an unequivocal declaration that the widow did take her share of the community property as heir of the husband, if it had designed that the widow's share should not be subject
33 to this tax, it would have made provision that it should be excepted from the operation of the law. If, however, the truth be as counsel urge, that it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts, must find the remedy.

The order and decree appealed from are affirmed.

HENSHAW, *J.*

We concur:

SHAW, *J.*

ANGELLOTTI, *J.*

SLOSS, *J.*

BEATTY, *C. J.*

LORIGAN, *J.*

34 Endorsed: Filed May 20, 1908. F. L. Caughey, Clerk, by N. C. Daroux, Deputy.

S. F. No. 4896. In Bank. May 20, 1908.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

Community Property—Husband and Wife—Interest of Wife under Spanish-Mexican Civil Law.—Under the Spanish-Mexican civil law, the rights of the wife in the community property never amounted to an estate, save upon the dissolution of the marriage or upon the death of the husband.

Id.—Id.—Interest of Wife Under Constitution of 1849.—Under the constitution of 1849 and the laws passed in accordance with its mandate, the interest of the wife in the community property is a mere expectancy, like the interest which an heir may possess in property of his ancestor.

35 Id.—Id.—Interest of Wife Under Present Constitution.—The constitution of 1879 does not, as did the constitution of 1849, command the legislature to pass laws defining the wife's rights in the community property, as no need existed therefor, such rights being judicially determined and settled.

Id.—Inheritance Tax Law—Taxation of Wife's Interest in Community Property upon Death of Husband Constitutional.—The requirement of the inheritance tax law subjecting the interest of the wife in the community property upon the death of the husband to the payment of such tax, does not violate any provisions of either of the constitutions of California or of the constitution of the United States.

Appeal from the Superior Court of Alameda County. T. W. Harris, Judge.

For Appellants—Warren Olney, Olney & Olney.
For Respondent—Snook & Church.

By the COURT: Upon petition for rehearing it is urged that the decision in this case fails to dispose of the federal question which appellant presented in argument. To the decision rendered the following is therefore added and made a part thereof.

Appellant further shows that the community property here under consideration was acquired under the constitution of 1849 and the laws referable thereto. That constitution, after defining the separate property of the wife, declared (art. XI, sec. 14): "Laws shall be passed more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband." Upon these facts appellant argues that the constitution of 1849, together with the laws passed in conformity with its direction, "conferred upon the wife an equal interest with her husband in the common property," and it is said that while the constitution of 1879 is silent upon the matter of the community property, nevertheless, neither that constitution nor any new laws passed under it can

deprive the wife of her interest in the community property guaranteed and secured to her by the constitution of 1849, and the question is asked: "Shall this court do what the legislature cannot do and take from her a vested right?" Appellant's counsel answer this question to their own satisfaction by invoking the aid of article I, section 10, and amendment XIV, section 2, of the constitution of the United States.

It cannot be doubted, indeed it is conceded, that the constitution of 1849, in speaking of property "held in common with her husband" does not refer to tenancies in common as known to the common law, but does mean property of the character now universally designated "community property." Thus, the declaration of the constitution of 1849 above quoted amounts to no more than a mandate to the legislature to define and prescribe the rights of the wife in the property of the community. The Spanish-Mexican civil law was, of course, the law in force in California at the time of its cession by Mexico to the United States and it was the design of the constitution of 1849 to preserve, so far as might be, to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property which they had enjoyed under the Mexican rule.

36 But even under the Spanish-Mexican civil law the wife had no vested estate in the community property. She had rights which may be loosely described as "vested" in the sense that the person to whom the rights belonged was not doubtful or uncertain but positive and known; in this sense her rights were vested but those rights never amounted to an estate. She became vested with an estate only (under certain contingencies) upon the dissolution of the marriage or upon the death of the husband, otherwise, as sums up Ballinger, after review of the system, "her interest seems to be a mere expectancy during coverture similar to that under the French system." (Ballinger on Community Property, p. 29.) And, says the supreme court of Louisiana (Boyer's Succession, 36 La. An. 506), "The wife has during the marriage no vested proprietary interest in any property composing the community, but only an inchoate right which entitles her to the hope or expectation that if she survives her husband she can receive or own one-half of the property that may be left after payment of the community debts." And again says Platt (Property Rights of Married Women; see *Fallbrook Ir. Dist.* v. *Abila*, 106 Cal. 362), "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But passing from the enunciations of these writers, learned in the law on the subject, we may come directly to the declarations and adjudications of our own court under the constitution of 1849 and the laws passed in accordance with its mandate, and we find Chief Justice Field, whose study of this Spanish-Mexican system was as profound as his mastery over it was complete, declaring "the interest of the wife is a mere expectancy like the interest which an heir may possess in the property of his ancestor." (*Van*

Maren v. *Johnson*, 15 Cal. 308.) Soon thereafter Mr. Justice Cope, speaking for the court in *Packard* v. *Arellanes*, 17 Cal. 525, says: "So long as the community exists her interest is a mere expectancy and possesses none of the attributes of an estate either at law or in equity. This was held in *Van Maren* v. *Johnson*, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. This same doctrine prevails in Louisiana and appears to be an established principle of the civil and Spanish law." And again, Mr. Justice Thornton, speaking for the court in *Griener* v. *Griener*, 58 Cal. 119, says: "The interest of the wife during the same period (coverture) was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is thus apparent that the construction put upon the constitution of 1849 and the laws passed thereunder is identical with that declared in *Estate of Burdick* and *Spreckels* v. *Spreckels, supra.* The constitution of 1879 does not, as did the constitution of 1849, command the legislature to pass laws defining the wife's rights in the community property because, as for thirty years those laws had been upon the statute books and as the rights under those laws had been from a very early date judicially determined and settled, no need existed in the new constitution to call for legislative action upon the matter.

For these reasons it is impossible to perceive where or how
37 the inheritance law under consideration does violence to any provision of the constitutions of California of 1849 or 1879 or to any provision of the constitution of the United States.

Rehearing denied.

The case before us is simply that of one who has purchased real property with the title burdened by an incumbrance done, made or suffered by the grantor, or someone claiming under him, seeking to recover the sum that he has paid to discharge such incumbrance, not from his grantor or his heirs, but from a third person, with whom he has not and never had any contractual relation whatever.

38 In the Supreme Court of the State of California.

Bank.

S. F. No. 4896.

In the Matter of the Estate of JAMES MOFFITT, Deceased.

On Appeal from the Superior Court in and for the County of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Henshaw, J.

We concur: Shaw J., Angellotti J., Sloss J., Beatty C. J., Lorigan J.

Whereupon, it is ordered, adjudged, and decreed by the Court that the Order and decree of the Superior Court in and for the County of Alameda in the above entitled cause, be and the same are hereby affirmed.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 20th day of April, 1908, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 20th day of July, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy.*

39 [Endorsed:] S. F. No. 4896. In the Supreme Court, State of California. Remittitur. Estate of James Moffitt, Deceased. Clerk's Costs, $—. Paid by Appellant, $—. Paid by Respondent, $—. Total, $12.50. F. L. Caughey, Clerk. By —— ——, Deputy.

40 I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a Petition for Writ of Error, Copy of Allowance of Writ, copy of Assignment of Error on Writ of Error, copy of Bond on Writ of Error, original Writ of Error, original Citation, copy of Transcript, copy of Decision of Supreme Court, and copy of Rehearing denied by Supreme Court in the case entitled In the Matter of the Estate of James Moffitt, Deceased, San Francisco Number 4896, as shown by the records of my office.

Witness my hand and the seal of the Court, this Eighth day of July, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

Endorsed on cover: File No. 21,274. California Supreme Court. Term No. 210. Delia Moffitt and Delia Moffitt, executrix, and James K. Moffitt and Herbert C. Moffitt, executors of the will of James Moffitt, deceased, plaintiffs in error, vs. M. J. Kelly, treasurer of the county of Alameda, State of California. Filed July 27th, 1908. File No. 21,274.

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

DELIA MOFFITT, and DELIA MOFFITT, Executrix, and JAMES K. MOFFITT and HERBERT C. MOFFITT, Executors of the Will of James MOFFITT, Deceased,
Plaintiffs in Error,

vs.

M. J. KELLY, Treasurer of the County of Alameda, State of California,
Defendant in Error.

No. 37.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFFS IN ERROR.

WARREN OLNEY,
Attorney for Plaintiffs in Error.

Filed this.....day of October, 1910.

.....*Clerk.*

By ....., Deputy Clerk.

THE BLAIR-MURDOCK CO., 68 FREMONT ST., SAN FRANCISCO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

DELIA MOFFITT, and DELIA MOFFITT, Executrix, and JAMES K. MOFFITT and HERBERT C. MOFFITT, Executors, of the Will of James Moffitt, deceased,

Plaintiffs in Error,

vs.

M. J. KELLY, Treasurer of the County of Alameda, State of California,

Defendant in Error.

Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFFS IN ERROR.

THE QUESTION FOR DECISION.

At the time California was admitted into the Union, by virtue of the laws of Mexico property acquired by the joint efforts of husband and wife, or acquired by

either of them subsequent to marriage, except such as either spouse acquired through gift, devise or descent, was community property. The Constitution of California of 1849, and which was in effect until January first, 1880, and the laws passed thereunder, continued this system upon the theory that the husband and wife held their joint acquisitions in common. The statutes of the State provide for the division of this property upon the dissolution of the community by death or by decree of the court. If the dissolution is because of the death of the husband, the statute has always provided that one half of this common property goes to the surviving wife.

In this case, 153 Cal. 359, the Supreme Court of California, basing its decision upon the authority of two recent decisions rendered by it, held that during coverture the husband is the sole owner of the community property and that upon his death the surviving wife takes half of this property as his heir and not in her own right, and for that reason alone that she is subject to an inheritance tax. It was contended by the plaintiffs in error in the State Court that, as Delia Moffitt, upon whom the inheritance tax was imposed, was married in California and she and her husband had acquired their property before any decision of the courts of the State construing the statutes so as to take away her interest in the community property, she is protected by the provision of the Constitution of the United States forbidding states to pass laws impairing the obligation of contracts. She also

contended that, as she takes half of the community property in her own right and not as heir of her husband, to impose a special tax in the nature of an excise tax on her was depriving her of the equal protection of the law. It was conceded by the court and by the counsel that if the wife did not inherit from her husband the half of the community property the law gives her upon the death of her husband, the tax was invalid. A short statement of what the court decided in this case is found in the opinion of the Supreme Court of California.

In re Kennedy's Estate, 108 Pac. 280,

decided April 1, 1910. At page 283 the court says, in regard to the case at bar:

> "The decision of this court in *Estate of Moffitt,* 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, that the surviving wife's share of the community property is subject to this inheritance tax was based *solely* on the proposition, established in this State by several prior decisions, that the wife takes such property *solely* by succession as an heir of the husband, and therefore 'by the intestate laws of this State.'
>
> The provisions of our tax act clearly show that the tax imposed thereby is one *solely* upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir." (The italics are mine.)

STATEMENT OF FACTS.

Delia Moffitt, one of the plaintiffs in error, is the surviving wife of James Moffitt, deceased. The other plaintiffs in error are herself, as executrix, and her two

sons, as executors, of the will of the said James Moffitt, deceased. At the time of her marriage both she and her husband were residents of the State of California and remained such residents until the death of the husband on the 25th day of October, 1906 (record, page 12, folio 23). The date of their marriage is not given, but it seems that there are four adult children, and before the first day of January, 1880, that is to say, while the Constitution of 1849 was in force, they had acquired as "community property" a very large estate. (See folio 23.) As matter of fact they were married in June, 1863. At the time of the death of her husband this common property had increased in value to about two millions of dollars. Mrs. Moffitt's rights are therefore fixed by the Constitution and laws of the State in force at the time of her marriage and at the time the property was acquired, that is to say, before 1880.

Shortly before Mr. Moffitt's death, viz., in 1905, the Legislature of California enacted a statute commonly called "Collateral Inheritance Tax" Law (see Statutes of 1905, p. 341), imposing an inheritance tax to be paid to the treasurer of the proper county, upon all property passing "by will or by the intestate laws of this State from any person who may die seized or possessed of the same."

Mr. Moffitt left a last will and testament, wherein and whereby he gave to his wife and four children all of his estate in the same proportions as if he had died intestate, and appointed Delia Moffitt as executrix and James K. Moffitt and Herbert C. Moffitt as executors.

(Folio 24.) This will was admitted to probate and thereafter and on April 22, 1907, (see folio 24) the executrix and executors filed an inventory and appraisement, wherein it appeared that the total valuation of the estate of the deceased at the time of his death was $1,883,626.23, and that all this estate was the community property of himself and his surviving wife. (Folio 23). The next day after the official inventory had been filed the court appointed one George H. Richardson to appraise the property for the purpose of estimating the amount of collateral inheritance tax that must be paid to the State of California. On the 4th day of October, 1907, (see folio 26) George H. Richardson filed his report, wherein he appraised the market value of the estate at the sum of $2,063,783.73. Thereupon, and on the same day (see folios 20 to 22), the court made an order confirming said report and directing Delia Moffitt, the surviving wife, to pay as inheritance tax on her half of the community the sum of $26,684.57. This order, filed on the same day the report was made (see folio 22), was not, however, entered in the probate minutes until October 11, 1907. By the statutes of California an appeal can be taken direct from the Superior Court sitting in probate to the Supreme Court of the State from such an order as the one above referred to. Immediately on entering the order Delia Moffitt, as the surviving wife, and Delia Moffitt as executrix, and the other two executors appealed to the Supreme Court of the State from so much of this order as directed the payment by Delia Moffitt of an inheritance tax upon her

half of the community property. (See bottom of page 15.) This appeal was heard by the Supreme Court and at the hearing the attorneys for Delia Moffitt and the executors argued, first, that the inheritance tax law did not impose, and did not intend to impose, an inheritance tax upon the wife's interest in the community property; second, that the Legislature had no power to impose such a tax; and third, they invoked "the protection of the Constitution of the United States, Article I, Section 10, declaring that no state shall pass any law impairing the obligation of contracts, and Article XIV, Section 2, providing that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The above quotation is taken from page 56 of the opening brief in the Supreme Court of California, and was the first opportunity under the California practice the plaintiffs in error had of raising the question. On the 20th day of April, 1908, the Supreme Court rendered a decision affirming the order of the court below, but omitting any reference to the federal question involved in the appellant's brief and on the oral argument. Thereupon a petition for a rehearing was filed and on May 20, 1908 (see page 49 of the record), the Court added to the opinion and made it a part thereof, its decision in answer to the federal question raised by the appellants. I have already stated what was decided and the grounds on which the decision is based. What is meant by the sentence after the words "rehearing denied" found at folio 37 we do not

know. It is evidently inserted in the record by mistake. See opinion of court as contained in the official publication, 153 Cal. 359. The chief justice of the State granted a writ of error to this Court.

CONSTITUTION AND STATUTES OF CALIFORNIA.

To sustain our contention that the surviving wife takes one half of the community property upon the death of her husband, *not as his heir but by virtue of her relationship to the property* and absolute owner of an interest therein, we rely upon the Constitution and statutes of the State of California in force during all the time the community property of the spouses, James Moffitt and Delia Moffitt, was being acquired. All this property was acquired *before* any decision had been rendered by the Supreme Court of California tending to deprive Mrs. Moffitt, or any other wife situated as she was, of the vested interest given to her by the plain language of the statutes in the common earnings of herself and her husband.

Up to the time of the admission of California into the Union the laws of Mexico were in force and those laws treated property acquired by either husband or wife after marriage as community property. It is difficult to obtain from the text writers on Spanish law exact definitions of the rights of each spouse in and to this property sufficient for all purposes of discussion, but it is safe to assume that the rights of husband and wife to the property acquired after marriage by their

own exertions jointly and severally constituted them owners of it in approximately the same sense that parties are the owners of "common property" under the laws of England and of the United States, but with some of the features of joint tenancy, such as survivorship. That was evidently the view of the framers of the first Constitution of the State. It was also evidently the view of the Supreme Court of California in *Panaud* v. *Jones,* 1 Cal. 488.

On the 13th day of November, 1849, the people of the State of California adopted a constitution, which remained in full force and effect until the first day of January, 1880, when what is commonly known as the new Constitution took effect. It was while this Constitution of 1849 was in force that the Moffitts acquired their property. Section XIV of Article II of the Constitution of 1849 recognizes the law then in force in the State pertaining to the rights of husband and wife so far as property acquired after marriage is concerned and treats such property as the "common" property of the spouses. The language of the section is as follows:

> "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property *as to that held in common with her husband.* Laws shall also be passed providing for the registration of the wife's separate property."

The Legislature of California at its first session attempted to comply with the above mandate of the Con-

stitution to pass laws more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. The statute is as follows:

> "An Act defining the Rights of Husband and Wife. (Passed April 17, 1850.)
>
> "Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.
>
> "Sec. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate; . . .
>
> "Sec. 10. No estate shall be allowed to the husband as tenant by courtesy upon the decease of his wife, nor any estate in dower be allotted to the wife upon the decease of the husband.
>
> "Sec. 11. Upon the dissolution of the community by the death of either husband or wife, one half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment.
>
> "Sec. 12. In case of the dissolution of the marriage, by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property or the sale and equal distribution of the proceeds thereof, as the nature of the case may require."

Then follows Section 14, which remained in force without modification until the codes took effect January 1, 1873. It was while this section of the law was in force that Mrs. Moffitt was married. This section reads as follows:

Section 14. "In every marriage hereafter contracted in this State the rights of husband and wife shall be governed by this Act, unless there is a marriage contract containing stipulations contrary thereto."

By amendments approved April 14, 1857, Statutes of that year, page 199, and of April 4, 1864 (Statutes 1863-4, p. 363), Sections 11 and 12 were amended so as to read as follows:

"HUSBAND AND WIFE.

"Sec. 11. Upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, go to the surviving husband. Upon the dissolution of the community by the death of the husband, one half of the common property shall go to the surviving wife, and the other half shall be subject to the testamentary disposition of the husband, and in absence of such disposition, shall go to his descendants, equally, if such descendants are in the same degree of kindred to the intestate, otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, shall be subject to distribution in the same manner as the separate property of the husband; provided, that in the case of the dissolution of the community by the death of the husband, the entire common property shall be equally subject to his debts, the family allowance, and the charges and expenses of administration. (Amendment, approved April 4, 1864; 1863-4, 363; took effect from passage.)

"Sec. 12. In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require; provided, that when such decree of divorce is rendered on the ground of adultery, or extreme cruelty, the party found guilty thereof, shall only be entitled to such

portion of the common property as the court granting the decree may in its discretion, from the facts of the case, deem just, and allow, and such allowance shall be subject to revision on appeal, in all respects including the exercise of discretion by the court below. (Amendment approved April 14, 1857, 199.)"

In 1872 the legislature adopted what is ordinarily known as the Civil Code, which took effect on the first day of January, 1873. The provisions of the Civil Code relating to community property and separate property of the spouses are as follows:

"Sec. 161. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

"Sec. 162. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."

Then follows Section 163, defining the separate property of the husband in the same language:

"Sec. 164. All other property acquired after marriage by either husband or wife, or both, is community property.

"Sec. 167. A wife cannot make a contract for the payment of money."

The above section was amended March 30, 1874, so as to read:

"The property of the community is not liable for the contracts of the wife made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.

"Sec. 172. The husband has the management and control of the community property, with a like absolute power of disposition (other than testamentary) as he has of his separate estate.

"Sec. 173. No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

"Sec. 177. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

"Sec. 687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

In relation to inheritances the Code provided as follows:

"Sec. 1383. Succession is the coming in of another to take the property of one who dies without disposing of it by will."

The Code then, by several articles, provides for the succession by heirs where the owner of property dies intestate and winds up with Section 1400, which reads as follows:

"Sec. 1400. The provisions of the *preceding* sections of this title, as to the *inheritance* of the husband and wife from each other, apply only to the separate property of the decedents."

After thus treating of inheritances of husband and wife from each other, the Code then provides for the disposition of the common property on dissolution of the community by death:

"Section 1402. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, accord-

ing to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

DECISIONS OF THE SUPREME COURT OF CALIFORNIA PRIOR TO 1896.

Before, however, citing the California cases giving effect to the provisions of the statute law relating to community property, it is well to refer to a decision of this court determining the meaning of precisely similar statutes to those of California in the State of Washington.

Warburton v. *White,* 176 U. S. 484.

The statutes of Washington are almost identical, word for word, with the statutes of California and are evidently copied from the older State. The Supreme Court of Washington in its opinion used language which is quoted with approval at page 490 of the decision of this court:

"By the provisions of the husband and wife acts passed in 1879, and previously, the husband and wife are considered as constituting together a compound creature of the statute called a community. In it the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*—a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, man-

ageable, convertible, and transferrable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon husband and wife together. As the husband's, 'like absolute power of disposition of his own separate estate,' bestowed by the 9th section of the act of 1873, was a mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the Legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done."

Further on this court, in its opinion by Mr. Justice White, says:

"Now, it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the Legislature of Washington, whether Territorial or State, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage with community funds became an acquest of the community, and not the sole property of the one in whose name the property was brought, although by the law existing at the time the husband was given the management, control, and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property when sold by him becoming an acquest of the community, subject to the trust which the

> statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

The opinion then, after stating that the construction placed upon the code by the Washington court should be followed, goes on to say (see page 496):

> "It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated the community system, and that in consonance therewith the statute referred to treated property acquired during marriage with community money as community or common property. Although this is patent, the argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and render it impossible, under the statute, for community or common property to exist. In other words, the interpretation relied upon asked us to say that because of a provision which simply pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about a result which was contrary to its express language, providing for the existence of the community system. It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquest during marriage, as if it were his own, therefore by law the community property belonged solely to the husband."

I respectfully submit that it cannot be doubted from the last quotation above that this court intended to approve the doctrine laid down by the Supreme Court of Washington and to say that no other construction can be placed upon the plain meaning of the language used in the statutes referred to. It is also a complete

answer to the argument on which the late California decisions are based, that because the husband has the sole management of the property he is the sole owner of it.

It may be well also to add in this place a statement that from the beginning of her judicial history the Supreme Court of California has uniformly held that "marriage is a civil contract and no form is necessary for its solemnization."

Graham v. *Bennett,* 2 Cal. 503.

When the Codes took effect, January 1, 1873, the same theory of marriage was continued as a part of the statute law of the State.

Section 55 of the Civil Code declares: "Marriage is a personal relation arising out of a civil contract." By subsequent amendments, after the famous case of *Sharon* v. *Sharon,* 75 Cal. 1, there were added to the above section of the Civil Code provisions for the solemnization of marriages so as to become matter of public record.

It may also be well to add to the statement made by this court of the characteristics of community property in *Warburton* v. *White* the statements of the only text writer on the subject that I know of, viz.:

Ballinger on Community Property,

published in 1895.

Referring to the states that have adopted the community system, the author says (Section 10) such states

" have done away with the common law right of dower " and curtesy and substituted in their place a half " interest in the marital gains and acquisitions made " during coverture."

"Section 11. *Theory of the community system and its characteristics.* The principle which lies at the foundation of the whole system is that whatever is acquired by the joint efforts of the husband and wife shall be their common property; the theory of the law being that the marriage in respect of property acquired during its existence is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity and possessing an equal right to succeed to the property after its dissolution in case one survive the other. To this community all acquisitions by either spouse, whether made jointly or separately, belong, and no form of transfer or mere intent of the parties can overcome this positive rule of law. All property is common except that owned previous to marriage or subsequently acquired in a particular way."

"Sec. 16. *The community as a partnership (Continued).* Strictly speaking, the term partnership is not an accurate one to be applied to the property status in community, for the community resulting from marriage is not in its nature co-extensive with the rights and liabilities of a commercial partnership. Many of the attributes, however, of a commercial partnership may be found in the rules of the community system, but it has not all the incidents of a partnership. As this system is under no obligation to the common law for its existence, its resemblance and analogies to the common-law partnership are incidental merely, and it should not be considered or understood as in any sense a common-law partnership, for the very use of the term partnership, unless understood as referring to the statutory marital partnership, is confusing and inapplicable. It is spoken of by the Spanish jurists as a "partnership between husband and wife," or "marital partnership," and by Ayora it is treated with the contract of partnership as a branch of co-partnership relation under Spanish jurisprudence. Escriche, how-

ever, says 'that there is established between the two consorts a partnership, though legal, different from others in that the acquisitions are the property of each in equal proportions.' The true theory of distinction between the community and an ordinary business partnership, as pointed out by Escriche, is this, that the acquisitions are by the law made equal in each consort, and this, too, notwithstanding the fact that one may contribute nothing in skill, labor or industry to the production of the acquest. It should be observed, also, that the husband is the sole business agent of this 'statutory creature,' while in ordinary partnerships one partner has active powers of agency regarding the management of its concerns equal with those of the other."

See, also, Section 17.

In Section 18 the author says:

"A concise and accurate definition of community property was pronounced by Chief Justice Hemphill in *Smith* v. *Strahan*, 16 Tex. 324, who said: 'The definition of com-' munity property includes all effects which husband and ' wife during marriage acquire by a common title, either ' lucrative or onerous, or which they, or either of them, ac-' quire by purchase or through their labor or industry,' and it may be added that it excludes all property acquired in any other manner. It has been well said that the legal import of these words 'community property' is *a community of property.*"

"Sec. 74. *Rights, interests and powers of the spouses in community.* By virtue of the marriage contract a partnership or community of acquests or gains is created between the spouses, so that they possess a joint ownership in all the property which the law declares to be in community. The ownership thus created is not that of a partnership nor a joint tenancy, although possessing some of the attributes of each. Under the statutes of California the spouses may, however, hold their property as tenants in common. The proprietary interests of the spouses in the common property is by the law made equal, and throughout the marital exis-

tence this relation must of necessity remain the same. The law nowhere permits this fixity of interest to be altered by the spouses, so as to increase the share of the one over that of the other. By the act of November 29, 1871, Session Laws of Washington Territory, 1871, page 67, express power was given the wife by which her share in the common property could be increased to more than one-half. This act was, however, repealed in 1873. The wife, by positive law, in the early history of the community laws, took one-third of all the gains made during coverture. The theory upon which this joint interest is mainly predicated is that the acquisitions of the matrimony are the fruits of the joint toil or common labor and industry of the spouses, and upon the dissolution thereof fall into equal parts between them. This equilibrium of interest conduces to restrain excessive avarice on the part of either consort, and guarantees to the wife a certain, definite and unvarying share in the assets of their joint productions, which she did not possess at the common law.

"During the coverture the husband and the wife may be said to be jointly seized of the property, with a half interest remaining over to the survivor. This interest, as has been observed, runs current with the estate, and becomes separable only upon the dissolution of the contract which superinduces it, or in other words, of the marriage. Neither spouse owns any specific part of this property before the dissolution of the community, whereupon their shares and interests become tangible, absolute and separable. The community, however, as well as the individuals composing it, may be vested with an equitable interest in property falling into community, but limitations on the nature of the common interest will in no wise affect the several interests of the spouses therein."

In support of the foregoing the author cites the California decisions hereinafter referred to.

Coming now to the decisions of the Supreme Court of the State of California rendered prior to 1896, construing the statute law relating to community property,

it will be found that in the main they are in accord with the theory of the Supreme Court of the State of Washington approved by this Court in *Warburton* v. *White* and the definitions contained in the text book by Judge Ballinger regarding the status and character of the community property. That is to say, these decisions are not in conflict with the plain meaning expressed by the words contained in the Constitution of 1849 and the statutes passed while that constitution was in force. It is true that there are some words used in some of the cases that would seem to imply that theoretically the wife had less than a vested interest in the community property, yet an examination of each case will show that there is no decision that did any injustice to the wife or deprived her of what the law so plainly gave her, viz., an equal interest with her husband in their common earnings and acquisitions. In

Panaud v. *Jones,* 1 Cal. 488,

the Supreme Court had occasion to determine the rights acquired by the surviving husband, whose wife died in 1846, before the conquest of California, and at page 513 the court is of opinion that the Act of April 17, 1850, defining the rights of husband and wife hereinabove set out, were substantially the same as the Spanish law in force in Mexico at the time of the conquest, except so far as Section 11 of the statute is concerned, which, it says, is a wide departure from the Spanish law on the subject. See, also, *Dye* v. *Dye,* 11 Cal., at page 169. Section 11 provides for the disposition of

the common property on dissolution by death and the Spanish law (see bottom of page 514) "declares that, the marriage being dissolved by the death of either husband or wife, the survivor may freely dispose of the Gananciales, although he or she may enter into a second or third marriage, and children of the first be living, without being obliged to reserve for such children either the property or proceeds of such Gananciales." That is to say, on the death of one of the spouses the survivor takes all of the property. The court then quotes from Febrero a statement that other judges of the Supreme Court of California have followed in regard to the opinion of this jurist as to the title of the property. But it appears from Judge Ballinger's work on Community Property, section 16 already quoted, that other Spanish jurists had a different idea of the rights of the wife under the Spanish law.

What has always been regarded in California until 1896 as the leading and authoritative statement of the California court of the rights of husband and wife in the community property is contained in

Beard v. *Knox,* 5 Cal. 252,

decided July term, 1855. There the wife was a non-resident, but her husband was a resident of California and accumulated considerable property. He died, leaving a will by which he bequeathed to his wife the sum of five hundred dollars in money and the residue of his estate, except some trifling legacies he gave to the daughter of himself and his wife. The Court held:

"The interest of the wife is a present, definite and certain interest, which becomes absolute at the death of the husband. The taking of a legacy by the wife under the will of the husband will not prevent her from contesting the validity of the will so far as it disposes of the half interest in the common property to others. She is entitled to her own share of the common property and entitled to a legacy out of the share of the husband."

The court says at page 256:

"Our statute has done away with the common-law right of dower, and substituted in place a half interest in the common property. This liberal provision was intended for the benefit of the wife, and the intention of so humane and beneficent a law should not be defeated by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband. The words 'with absolute power to dispose of' ought not to be extended to a disposition by devise. The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which, the law of this State determines the estate, and the widow becomes seized of one-half of the property. . . . But it is urged, that by accepting the legacy, the plaintiff is estopped from setting up a claim to one-half of the estate. It is a familiar principle that an heir cannot take as a legatee and afterwards dispute the validity of the will; but this principle does not apply in the present case. The deceased had no authority to dispose of but one-half of the property—this he might do to whomsoever he pleased. The plaintiff does not contest that right, but only seeks to withdraw her own property from the operation of the conveyance, which it is claimed has despoiled her of it. This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate, and not her own."

It will be observed that this is an express adjudication that the wife does not take from her husband as his heir or otherwise, but in her own right as a part owner of the property, and further, that she is not estopped by accepting a legacy under her husband's will from asserting her right to her own property.

In *Smith* v. *Smith,* 12 Cal., at page 224, the court, per Field, Justice, says:

> "The law investing in the husband the absolute power of disposition of the common property as of his separate estate, designed to facilitate its *bona fide* alienation and to prevent clogs upon its transfer by claims of the wife; and we are not prepared to say that, under the comprehensive language of the statute, a voluntary settlement or a gift of a portion of the common property not being unreasonable with reference to the entire amount, the claims against it and the situation of the parties would be invalid; but we think it clear that the law, notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claim of the wife."

Upon that proposition see the concurring opinion of the Chief Justice in the Spreckels case (116 Cal. 339).

The Court also says:

> "The law of this State in relation to the rights of husband and wife as to the common property is similar to the law of Louisiana and Texas; and in those States it is held by the highest tribunals that all property acquired by either spouse during the existence of the community is presumed to belong to it and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate."

The recent decisions of the Supreme Court of California are exactly to the contrary, holding that the acquisitions of both spouses do not belong to the community but to the husband.

Meyer v. *Kinzer,* 12 Cal. 247, January term, 1859.

The opinion of the court was delivered by Field, Justice. The opinion first quotes the Statute of 1850, defining the property rights of husband and wife as given above, and then adds:

> "These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved."

In *Scott* v. *Ward*, 13 Cal. 469, the court, through Field, Justice, quotes the language from *Beard* v. *Knox,* which we have given above, with approval.

In *Van Maren* v. *Johnson,* 15 Cal. 308, suit had been brought against a married woman and her husband on

a debt contracted by her previous to her marriage. A judgment was entered with a direction that it be enforced only against the separate property of the wife and the common property of both. The Court held that the judgment was correct, and thereby held that payment of the wife's debt could be enforced by sale of the community property. But the Court said:

> "The interest of the wife is a mere expectancy, *like* the interest which an heir may possess in the property of his ancestor."

This is the first intimation from a court that the constitution and laws conferring upon the wife an equal interest with her husband in the common property do not in truth and in fact confer upon her anything except a mere expectancy like that of an heir. The statement was not necessary to sustain the decision and was evidently made without consideration, and is based upon the authority of a Louisiana case, which only speaks of the rights of the wife under the civil law. I shall presently refer to the doctrine of the Supreme Court of Louisiana that the wife has a vested interest in the community property which the legislature cannot take away.

In *Packard* v. *Arellanes*, 17 Cal. 525, the court says:

> "Our whole system by which the rights of property between husband and wife are regulated and determined is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induce its adoption and the rules and principles which govern its operation and effect. The relation of husband and wife is regarded by the civil law as a species of partnership, the property of

> which, like that of any other partnership, is primarily liable for the payment of its debts. 'The law,' says Schmidt, in his work on the Civil Law of Spain and Mexico, 'recognizes 'a partnership between the husband and wife as to the 'property acquired during marriage.' The same doctrine is laid down by many other writers, and such seems to be the universal understanding of the nature of the marital relation in matters of property as viewed by the civil law."

After the above statement, that the relation of husband and wife as to the community property is a species of partnership, the court, at page 538, says:

> "The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community and entitled to an equal share of the acquests and gains; but *so long as the community exists* her interest is a mere expectancy and possesses none of the attributes of an estate either at law or in equity. This was held in *Van Maren* v. *Johnson,* before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor."

It will be observed the court here was speaking of the interest of the wife in the common property before the death of the husband, and compares her interest at that time to the interest that an heir possesses in the property of his ancestor. That is as far as the court went in that case and in *Van Maren* v. *Johnson* in depriving the wife of the property rights conferred upon her by the Constitution and the statute. The court then proceeds to quote from *Guice* v. *Lawrence,* 2 La. Ann. 226, upon which the statement of Field, Justice, was founded in *Van Maren* v. *Johnson.* The quotation begins as follows:

"The laws of Louisiana have never recognized a title in the wife during marriage to one-half of the acquests and gains. The rule of the Spanish law upon that subject is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them under the pretext that the law gives her one-half. . . . The interest secured to her by the statute only vests upon the death of her husband; and whether it is ever to assume a legal shape depends upon the contingency of her being the survivor. Where the marriage is dissolved by her death her descendants succeed to the interest to which she would otherwise be entitled. They do not, however, succeed to such interest as a portion of her estate, but because it is vested in them by the statute."

I understand that the Louisiana law on community property is taken from the Code Napoleon, which is very like the Spanish or civil law, but is not so favorable to the interests of the wife. What the wife's interest was under the Spanish law appears from the opinion of the court in *Panaud* v. *Jones,* 1 Cal,, above cited.

The Louisiana courts hold positively that the wife's interest during coverture is a vested interest. See

Dixon v. *Dixon,* 4 La. 188, 23 Am. Dec. 478,

referred to *infra.*

The last sentence above quoted is very pertinent and applicable to the case at bar. Under the statute in force at that time the heirs of the wife, when the community was dissolved by her death, took her one half of the property. But it will be observed the

court says that they do not succeed to such interest as a portion of her estate, but because the statute vests that portion in them. So here, even though it be admitted that the wife has no vested interest in the community property during the life of the husband, yet on the dissolution of the community by the death of the husband she does not succeed by inheritance or otherwise to the one half *as a portion of his estate,* but because it is vested in her by the statute. That is to say, she does not take as heir but becomes vested in one half of the estate by virtue of her survivorship and the declaration of the statute. The court goes on to say:

> "It is suggested that in this respect the statute is an unconstitutional infringement of the right of the husband, but we do not perceive the force of this suggestion. It is true the husband, so long as the marriage exists, is regarded as the owner of the whole property; but his rights of ownership are derived from the statute and he holds the property subject to its provisions."

That is to say, he holds the community property while the community lasts subject to the provision of the law that upon his death one half of it vests in his wife as the survivor. It is not probable that any real injustice would be done to the wife if the Supreme Court of California had adhered to the above theory that, though during the existence of the community the entire title, so far as the world at large is concerned, is vested in the husband, yet as between him and his wife his title is subject to the provision of the law that upon his death one half of the property vests in the wife.

But these statements of theories regarding the rights of the wife are pure dictum. When a case arose, as we shall presently see, where the facts required an adjudication as to the status of the wife during coverture to the community property, the court did not hesitate to make her interest equal to that of her husband.

Ord v. *De La Guerra,* 18 Cal. 67, April term, 1861.

In this case the wife died in 1843. The husband died in 1858. One of the wife's heirs brought suit against the executors of the husband to recover her share of the estate of her mother. A demurrer to the complaint was sustained and judgment entered in favor of the defendant. The Supreme Court reversed the judgment. The court said:

> "Upon the cessation of the matrimonial union by the death of the wife, the husband might still continue the possession of it, as surviving partner of the matrimonial union, and might sell or dispose of it in liquidation of the community debts. . . . The heirs do not claim as succeeding to the title of the father, but as succeeding to the title of the mother. There is no necessity, as we held in the case of *Packard* v. *De La Guerra,* for taking out administration upon the mother's estate. The husband holds really as survivor of this matrimonial co-partnership, and as the remedy of the heir is governed by the laws now existing, we see no difficulty in giving to the right of the heir, whether arising out of a past system or the present, the same remedy which we would apply in the case of a representative at common law claiming of a surviving partner in a commercial partnership, distribution of partnership effects left, after the settlement of the firm debts, in the hands of such survivor. *He holds not as owner, but as partner; first, to pay the debts—a duty devolving upon him by his relation to the*

> *deceased partner and to the creditors; and, secondly, as trustee for the representatives of the deceased, so far as their interest in the residue of the estate is concerned."*

The opinion was delivered by Baldwin, Justice, concurred in by Field, C. J., and Cope, J.

Payne v. *Payne,* 18 Cal. 291, July term, 1861.

Theodore Payne died possessed of a large estate, and leaving him surviving a widow, the plaintiff, and three infant children, the defendants. The real estate was common property. He devised all of his property to his wife, to the exclusion of his children. The widow brought an amicable suit against her children to determine their respective rights in the property. The court held that she was entitled to one half of the common property, as the survivor of the community, and to the other half under her husband's will. The opinion is by Field, Chief Justice. The court expressly reaffirms *Beard* v. *Knox,* saying:

> "We have no doubt of its correctness and we only affirm and follow it in holding, as we do in the present case, that *the plaintiff took one undivided half of the common property in her own right, by virtue of the community existing between herself and her husband;* and that the remaining one half was subject to his testamentary disposition."

If Mrs. Moffitt in the case at bar takes an "undivided one half of the common property in her own right by virtue of the community existing between herself and her husband," what becomes of the theory that she takes as heir of her husband and must pay an inheritance tax?

In *Hart* v. *Hart,* 21 Cal. 346, January term, 1863, the opinion of the court was delivered by Field, Chief Justice. The action was ejectment by the surviving wife and it was held that if the contention of the defendant was correct that the deed under which she claimed, and which was made during the lifetime of her husband for a money consideration, vested the property in the community, then "the property belonged to the "community existing between herself and husband, and "upon his death she succeeded, as his survivor, to one "undivided half interest therein, the remaining inter- "est descending to his heirs. As tenants in common "with the heirs she could maintain the present action "for the possession of the entire premises against the "defendant, who is a mere intruder thereon." That is to say, the Court holds that, as survivor of the community, she can maintain the action for ejectment for the entire property as against an intruder.

Observe too that the court holds that the property belongs to the "community" during coverture, and on the death of the husband the wife succeeds as "survivor."

Fuller v. *Ferguson,* 26 Cal. 546, October term, 1864.

The claim was made there that certain property conveyed to the husband, while the civil law was still in force, was purchased with money earned by the wife. We quote from the *syllabus*:

> "By the Mexican law the husband alone could manage or administer the property of the partnership and he could sell or dispose of it as he deemed proper, provided he did so without intent to injure the wife."

At page 565 the court quotes from Febrero as follows:

> "To the married woman is imparted and transferred by usage and legal authority the dominion and possession, revocable and fictitious, of the one-half of the property which during the marriage she gains and acquires with her husband, but after he dies the same passes to her irrevocably and effectively, so that after his death she becomes the absolute owner in possession and property of the one-half which he leaves, in the manner prescribed by law between conventional partners."

It is evident this statement by Febrero, so often referred to by our early courts, is the foundation of all the arguments for depriving the wife of her interest in the community property. But see other Spanish authorities from Ballinger on Community property, quoted *supra*. But it will be observed that all Febrero says is that her dominion and possession are fictitious during coverture, but when he dies, then her dominion and possession become absolute and she is vested with the full title to the one half of the community property. Upon his death she succeeds to the property, not as her husband's heir, nor on account of her relation to him, as would be the case of a child or other heir, *but because of her relation to the property itself.*

At page 566 the court quotes from Schmidt's Civil Law of Spain and Mexico as follows:

"The law recognizes a partnership between the husband and wife as to the property acquired during marriage and which exists until expressly renounced."

At page 567 the court says:

"Each of the spouses is entitled to an equal share in the community property and they are liable equally to the losses and debts incurred during the existence of the conjugal partnership. During the existence of the marriage the husband alone manages or administers the property of the partnership and he can sell and dispose of it as he deems proper, provided he does so without intent to injure his wife."

Throughout *Fuller* v. *Ferguson* community property is treated as partnership property.

Godey v. *Godey,* 39 Cal. 157, April term, 1870.

A decree of divorce on the application of the husband had been pronounced, but the decree was silent regarding the community property. The wife subsequently brought an independent action to recover her share of the community property. The court said of the wife:

"Her almost total disability to interfere, by action or otherwise, in the control of the community property during the existence of the marriage arose from the provisions of the statute by which her husband was vested with its exclusive management. The decree here, however, deprived her of her husband, and, of course, remitted her as being discovert to the use and present control of any property to which she might be entitled. Nor is there any doubt that as a consequence of that decree she is entitled to a share of the property, if any, acquired by the late matrimonial community of which she was a constituent. . . .

Even if the decree had directly fixed upon the respondent the guilt of adultery, the statute would not on that account forfeit the whole or any part of ***her share in the common property*** to which she would have been otherwise entitled. It merely permits the court, in its discretion, under such circumstances, to visit that consequence upon her by its judgment. . . . Under the provisions of the statute, property which is acquired during the marriage, unless acquired by gift, bequest, devise, or descent, is common property. It belongs to the matrimonial community, and not less to the wife than to the husband. It is true that the interest of the wife therein pending the marriage has been termed "a mere expectancy" (*Van Maren* v. *Johnson*, 15 Cal. 311); but while, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her, as that the husband cannot deprive her of it by his will (*Beard* v. *Knox*, 5 Cal. 256), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it. (*Smith* v. *Smith*, 12 Cal. 226.) The theory upon which the right of the wife is founded (as we said in *Galland* v. *Galland*, 38 Cal. 265), is that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court, etc. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it. In the case at bar, then, the right of the respondent to a share of the property in question, if it be proven to be community property is clear. It accrued to her, as having been acquired in part by her own efforts, before the decree of divorce was rendered; that decree as rendered did not deprive her of it. The effect of the decree, acting upon her personal status, was to remove from her the disability, theretofore, as we have said, almost total, to sue concerning it, or to interfere in

anywise in its control. Under the operation of that decree, too, the appellant, ceasing to be "husband," was no longer the head of the community which had itself ceased to exist, and, as a consequence, he lost the exclusive control and the somewhat absolute power to dispose of the community property; thenceforth the parties stood upon equal grounds in that respect, and neither could wholly exclude the other from a participation in the property and its present disposition."

It will be observed that in order to decide the case in favor of the wife it was necessary to hold that there was equality of interest in the community property, that the partnership or community was dissolved by the divorce, that the husband was not thereafter the agent of the community, and that thereafter he and his divorced wife stood on an equal footing in respect to the management of the common property. The opinion, therefore, fits the case and properly supports the judgment.

Broad v. *Broad,* 40 Cal. 493, January term, 1871.

There the land in controversy vested in the defendant and his wife in 1852 as community property. The wife died in 1858. The plaintiffs in the action were their children. The defendant was the husband and father. The action was for partition, on the ground that the plaintiffs were tenants in common with their father because their mother had a half interest in the property by virtue of its being community property. The court, in construing the act of 1850, which we have already cited, said:

"There is no room for construction so far as this question is concerned, except as to the meaning of the words 'shall go.' As related to the survivor of the community, there can be no doubt that those words mean 'shall vest.' The survivor takes one-half of such title as the community held."

The court decided that the children, upon the death of their mother, became tenants in common with their father of the premises in controversy. That case has never been questioned and was relied upon in *Johnston* v. *San Francisco Sav. Union,* 75 Cal. at p. 144, decided in 1888, where the court quotes the language which we have above referred to from *Broad* v. *Broad,* and says the husband after the wife's death "took as surviv-" ing partner, not as a continuing partner. The part-" nership was dissolved by the death and his duty was " to settle up its affairs, not to proceed to impose new " burdens upon the property in the prosecution of new " enterprises."

The court thereupon held that the interest of the children could not be impaired by the father incurring new debts after the dissolution of the community, though he might renew old debts.

Broad v. *Broad* was also affirmed in *Broad* v. *Murray,* 44 Cal. 228.

Galland v. *Galland,* 38 Cal. 265, July term, 1869,

was where the wife brought an action against the husband for a reasonable allowance for the maintenance of herself and child, without the application of a prayer

for divorce. The court granted the application, and one ground upon which it based its action was the fact that the wife had an equal interest with her husband in the community property. At page 271 the court says:

> "Under the laws of this state the wife not only retains her separate property, but that which is earned during the marriage, becomes the common property of the husband and wife; and, though it is subject to his control, as the head of the family, whilst the marriage continues, yet, if the wife survives him, or if the marriage relation be dissolved by decree of the court, except for the adultery or extreme cruelty of the wife, she is entitled to one-half of the common property then remaining. The theory on which this right is founded is, that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them, if the marriage tie is dissolved either by the death of the husband, or by the decree of the court, unless the wife shall have forfeited her right by committing an act of adultery, or extreme cruelty; and even then, the court pronouncing the decree is authorized to apportion the property at its discretion. With these liberal provisions for the wife, who has a joint and equal interest with the husband in all property acquired during the marriage, it would present an anomaly in jurisprudence if the husband, without cause, could drive his wife from his house without any provision for her support, and appropriate the common property and its income to his own use, whilst the courts would be powerless to compel him to set apart a portion of the property for her support, unless she coupled with her application a prayer for divorce; and if she had no lawful ground for a divorce, or was unwilling to assert it, she would remain utterly without redress from the courts, and might starve for lack of the necessaries of life, unless she could persuade some reluctant tradesman to furnish them on the credit of her husband."

It is not putting it too strongly to say that, until the recent decisions of the Supreme Court of California in what are known as the Burdick Case and the Spreckels Case, the universal opinion in California among the people, at the bar, and on the bench, of the rights of married women to community property was, as stated by Mr. Justice Crockett in the opinion in *Galland* v. *Galland,* above quoted.

The foregoing are all the decisions of the Supreme Court of California construing the act of 1850 and its amendments while the act was in force. After the Codes took effect (Jan. 1, 1873) there is no decision on the subject that I know of until the Burdick case, decided in 1896, except

Griener v. *Griener,* 58 Cal. 115,

That case is cited as supporting the views that the wife inherited her share of the community property from her deceased husband. An examination of the case will show this is a mistaken assumption. Only four judges took part in the decision. The opinion is written by Judge Thornton and concurred in by Judge Sharpstein, but the Chief Justice and Judge Myrick, while concurring in reversing the judgment of the court below, expressly dissented from the views expressed by Judge Thornton in regard to the inability of the wife to maintain an action against the husband and his grantee for fraudulently disposing of the property of the community. Judge Ballinger, in his work on Community Property, Section 87, calls

attention to the dissent of Judge Myrick as especially worthy of notice, and I respectfully submit that Judge Myrick's views must appear sound to every unprejudiced mind.

We come now to the first decisions of the State of California holding that the wife has no interest in the community property. The first was rendered in the year 1896 and is the *Estate of Burdick,* 112 Cal. 387. What was said in the prevailing opinion in that case was not necessary to a decision of the case. I cannot do better than refer to the concurring opinion of Mr. Justice Harrison and to the reasons he gives for not concurring in the prevailing opinion of the court. The prevailing opinion says:

> "The estate of the wife in the community property is a creature of the statute and is, of course, just what the statute has made it."

There is no reference whatever to the Constitution of 1849, which does recognize the community property as the common property of both husband and wife. It did not appear in the Burdick case when the property was acquired, but the decision is based solely upon the code provisions. (See page 393.) There is no attempt to construe the Statute of 1850, except to say that the law in California "has always been pretty much what " it now is, though formerly upon the dissolution of the " community by the death of the wife one-half of the " property descended to her heirs. Even then, however, " it was held that the title was in the husband and the

" wife's interest in it was a mere expectancy." Quoting *Packard* v. *Arellanes,* 17 Cal. 525.

The next decision is the case of

Spreckels v. *Spreckels,* 116 Cal. 339.

The judgment in that case was probably right, as it was in the Burdick case, but the reasons given for it in the prevailing opinion are unjustifiable. The prevailing opinion says:

> "The constitution does not mention community property, but does define what shall constitute the separate property of the spouses."

It therefore ignores the provisions of the Constitution of 1849. At page 342 the court says:

> "This court has held, after mature consideration, that upon the death of the husband the wife takes one-half of the community property as heir."

The judge undoubtedly here refers to the Burdick case. That the decision should have been put on other grounds will appear from the opinion of Chief Justice Beatty, beginning at page 349.

The action was brought by Spreckels and his wife against their son Rudolph Spreckels to set aside a gift made on July 31, 1893, by the husband alone of community property. The theory of the complaint was that two years prior to the gift Section 172 of the Civil Code had been amended so as to prohibit the husband from giving away the community property without the consent of the wife, and therefore this gift was void. The complaint did not state when the property given away

was acquired, but the court assumed that it was acquired prior to the amendment. The Court held that the husband was the absolute owner of the community property and as to property acquired prior to the date of the amendment could give it away if he saw fit without regard to the rights of his wife. That is to say, the entire ownership was vested in the husband and the Legislature had no right to limit his power to give the property away, so far as property acquired before the act of limitation was passed.

The decision in the case at bar, that the full ownership of the community property is vested in the husband and what interest the wife takes in the community property on his death she takes from him as his heir, is based upon the two foregoing cases. But in those cases there was no attempt to construe the Constitution of 1849 nor the Statute of April 17, 1850, defining the rights of husband and wife above cited.

There was no reference to the contract rights of the wife given by Section 14 of the Act of 1850, though that statute was in force till January 1, 1873, and continued by Section 177 of the Civil Code. The effect of these cases was to repeal the laws of California giving the wife any interest in the property of herself and husband and to give it absolutely to the husband.

Of course it is elementary that contract rights in property cannot be taken away by subsequent legislation, nor by subsequent construction by the courts of the meaning of statutes. It was conceded in the court below and by the counsel that if Mrs. Moffitt's rights in

the community property were anything more than inchoate, that in fact if she had any rights, they could not be divested to the extent of taking a portion of her property as a special tax, and judgment must go the other way.

In re Chavez, 149 Fed. Rep. 73,

was where the Circuit Court of Appeals for the Eighth Circuit adjudged the right of the wife to community property in the Territory of New Mexico was a vested right which could not be disestablished by the Territorial Legislation. The contest was between the wife of the bankrupt and a creditor who claimed that an act of the Territorial Legislature passed in 1901 released the community property from the claims of the wife based on previous statutes, the previous statutes being almost identical with those in California. Referring to the subsequent statutes, the Court said, page 78:

> "Conceding this to be the purpose, it would be prospective only in its operation. It could have no retroactive effect so as to affect the established status of such property existing at the time of the passage of the act. It could not disestablish rights which had already attached to the community property. This is elementary."

The community in that case had not been dissolved.

A quotation from Febrero in an early Louisiana case has been the foundation for all the arguments made in California in support of the contention that what the statute plainly gave her was not given at all, but in *Dixon* v. *Dixon's Administrator,* 4 La. 188; 23 Am. Dec. 478, the Court held the wife had a vested interest

arising from the marriage contract that subsequent legislation could not affect. The syllabus says:

> "A right to community of acquests and gains existing by the law of the place and time of marriage is a right springing from contract and cannot, therefore, be taken away by subsequent legislation."

The Court said:

> "Property found in a succession is regulated by the law in force at the time it is opened, no matter how different or contrary thereto the rule may have been when the estate was acquired. It is of some importance to ascertain whether the same rule applies in regard to that which enters into the community of acquests and gains. We think it does not. The rights of heirs arise from the death of the ancestor. The rights of husband and wife in the partnership of gains grow out of the marriage contract, and do not originate in its dissolution; and it is impossible to distinguish between the interest proceeding from such a contract, and that which springs from any other agreement the law sanctions. If, therefore, by the law of the country where the marriage took place, a community of acquest and gains was declared to be created by the marriage, or, in the language of our code, superinduced of right by the contract, we should think that a subsequent law declaring there should be no further community between the persons who had entered into this agreement would be retrospective, and as much a violation of rights vested under the contract as a statute would be, which would alter the obligations imposed, or impair the rights acquired under a contract of sale or of lease."

It seems the Louisiana law contains a provision as follows:

> "The wife has no sort of right in the acquest and gains until her husband be dead."

But the Court held that other provisions of the Louisiana code gave her a right which could not be impaired

by subsequent legislation. So far as I know this case has never been questioned.

If it should be conceded that by the law of California the wife had an interest in the community property, then it follows without room for doubt that that right cannot be taken away by any subsequent legislation.

This brings us back to what I have been contending all along and that is that the plain unambiguous meaning of the language contained in the Constitution of 1849, and the Husband and Wife Act of 1850, and the Civil Code of California, do give to the wife a vested interest in the community property and therefore the Act of 1905, imposing an inheritance tax is invalid in so far as it attempts to impose, if it does make such an attempt, which I do not believe, a tax on the surviving wife's half of the community property.

Before closing this brief on the question at issue I beg to call attention to the reasoning of the California courts in the case at bar and in the Burdick case and Spreckels case, wherein the California court tries to show that because the husband, during the existence of the marriage is given the sole management of the community property he is therefore the sole owner of it, and ask the Court to compare this reasoning with the reasoning of the Court in the Louisiana case of *Dixon* v. *Dixon,* and especially with the opinion of this Court in *Warburton* v. *White* as expressed in the last quotation from that opinion hereinbefore set out. I venture to say that no reasonable man, whether lawyer or l[illegible] an,

can for a moment doubt where good sense and justice lie. It is not a debatable proposition.

But if the question is asked, though Mrs. Moffitt had a vested interest in the joint accumulations of herself and husband under the Constitution and laws of the State of California, may not a special tax be imposed upon her half of the community property without being obnoxious to those clauses of the Federal Constitution prohibiting states from passing laws impairing the obligation of contracts or from passing laws denying any person the equal protection of the law, the answer is at hand. An inheritance tax is a special or excise tax. It is not imposed upon property, but a tax imposed by the state in consideration of the privilege given by the state to inherit.

On the death of James Moffitt one-half of the community property of himself and his wife became absolutely the property of the surviving wife and under the Constitution of California is not subject to any other tax than such taxes as are imposed upon all property by the general laws of the state. It is only upon the theory that the deceased husband was the sole owner of this property and that she inherited from him as his heir that the Supreme Court of California sustained the validity of the tax. In other words, it has been admitted throughout that the tax was invalid if James Moffitt was not the sole owner of the property. See the opinion of the court and also the opinion

In re Kennedy's Estate, 108 Pac.,

already quoted in this brief. The state has absolute control of inheritances and may take away altogether the right to inherit and may impose such special taxes on the privilege of succeeding to the deceased as it sees fit.

Article XIII, Section 1, of the California Constitution declares:

> "All property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law."

Mrs. Moffitt's property must pay its share of the State, County and Municipal taxes in proportion to its value, but under the State Constitution no special tax can be imposed upon it or upon her as the owner of it.

The Supreme Court of California in

Estate of Wilmerding, 117 Cal. 282,

and in

Estate of Stanford, 126 Cal. 11,

says that an inheritance tax "is in the nature of an ex- "cise tax or a tax upon the right of succession and is "within the constitutional power of the Legislature. ". . . The right of inheritance, including the designa- "tion of heirs and the proportions which the several "heirs shall receive, as well as the right of testamentary "disposition, are entirely matters of statutory enactment "and within the control of the Legislature. As it is "only by virtue of the statute that the heir is entitled to "receive any of his ancestor's estate, or that the ancestor "can divert his estate from the heir, the same authority "which confers this privilege may attach to it th[illegible]

" tion that a portion of the estate so received shall be " contributed to the state, and the portion thus to be con- " tributed is peculiarly within the legislative discretion. " As this tax is not upon the property, but upon the right " of succession, the constitutional provision that all " property shall be taxed according to its value is inap- " plicable."

The opinion in the Wilmerding case cites *U. S.* v. *Perkins,* 163 U. S. 625.

It is upon that theory—viz. that the Legislature has the absolute right to direct the disposition of property when the former owner dies, and to designate who shall succeed the former owner—that all courts have acted in sustaining inheritance tax laws. The courts say, the Legislature may, if it sees fit, in the life time of the father, take away a part or all of a child's right of inheritance in his father's estate. How different is the situation of the wife. The community property is in part her property. Possibly she earned all of it. Such instances are not uncommon.

If Mr. Moffitt at the time of his death was the sole owner of the estate acquired by the joint efforts of himself and his wife, or by either of them, the Legislature may take any part or all of it from the widow. The Legislature may change or entirely alter the line of descent. An heir succeeds to the ancestor's estate only by virtue of the law at the time of the ancestor's death. But in the case at bar, Mrs. Moffitt, at a comparatively early day in the history of California entered into a marriage contract, deemed to be the most sacred known

to mankind. The laws of the state relating to the property rights of herself and husband were a part of this contract, and expressly declared that their rights should be determined by the law as it then stood. This law declared that her earnings, her husband's earnings, and their joint earnings should be the common property of herself and her husband so long as they two lived, and upon the dissolution of the marriage she should have one-half of it. I submit that the Constitution of the United States will uphold this contract and protect this widow. I submit further that there is not a case in the books where the courts have adjudged a law to be in violation of vested rights where the violation was so grossly manifest as in this case, nor have I known or read of a case, where the inviolability of a contract has been upheld, where the consequences of holding the other way and giving the Legislature of the states full liberty to encroach on private rights, could, if the Legislature should choose to exercise its power, have such disastrous results as to hold what is now contended for, that a wife has not a vested right in community property, acquired possibly by herself alone, and certainly acquired by herself and husband. I ask that the judgment of the Supreme Court of California be reversed.

WARREN OLNEY,

Attorney for Plaintiffs in Error.

that the wifes interest is a vested one
McKay on Community Property
[illegible] 502. 575
[illegible] jurisdiction See McCullough

No. 37...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

DELIA MOFFITT, and DELIA MOFFITT, Executrix, and JAMES K. MOFFITT and HERBERT C. MOFFITT, Executors of the Will of James Moffitt, deceased.

Plaintiffs in Error,

vs.

M. J. KELLY, Treasurer of the County of Alameda, State of California,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

U. S. WEBB, Attorney General
of the State of California,
Attorney for Defendant in Error.

SNOOK & CHURCH,
Of Counsel.

Filed this.....day of November, 1910.

.....*Clerk.*

By.....*Deputy Clerk.*

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IN THE

SUPREME COURT

OF THE

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DELIA MOFFITT, and DELIA MOFFITT, Executrix, and JAMES K. MOFFITT and HERBERT C. MOFFITT, Executors of the Will of James Moffitt, deceased,

Plaintiffs in Error,

vs.

M. J. KELLY, Treasurer of the County of Alameda, State of California,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

On the 20th day of April, 1908, the Superior Court of the State of California rendered judgment in the above entitled matter, affirming the judgment of the

Superior Court of the State of California in and for the County of Alameda, and ordered the executrix and executors of the will of James Moffitt, deceased, and Delia Moffitt, the surviving wife of said deceased, to pay the sum of $26,684.57, as an inheritance tax on the one half interest of Delia Moffitt in the community property, as the surviving wife of the community, composed of her husband, James Moffitt, and herself. Said Supreme Court of the State of California, on the 20th day of May, 1908, denied a petition for rehearing in said matter, whereupon plaintiffs in error prosecuted this appeal to the Supreme Court of the United States. They invoke the protection of the Constitution of the United States, to wit: Article I, Section 10 thereof, and Article XIV, Section 2 thereof, contending that as all the property of said deceased was the community property of himself and wife, Delia Moffitt succeeded to one half thereof upon the death of her husband, under the Constitution and laws of the State of California in force at the time of her marriage, and at the time said property was acquired, not as the heir of her husband, but because she had a vested interest therein, and therefore no tax could be imposed by the State of California in the nature of an inheritance tax; that on the death of her husband, one half of said property became hers absolutely, by virtue of the law in force at the time she helped to acquire it; that it is therefore absolutely hers, and is not subject to any other taxes than such taxes as are imposed upon all property by the general laws of the State.

Plaintiffs in error assign as error:

1. The Supreme Court of the State of California erred in holding and deciding that Delia Moffitt, the surviving wife of James Moffitt, deceased, did not have a vested interest or right in the community property of herself and her deceased husband.

2. The Supreme Court of the State of California erred in holding and deciding that under the Constitution and laws of the State of California, and particularly the Constitution and laws of the State of California as they existed up to the first day of January, 1880, the wife, upon the death of the husband, succeeded to an interest in the community property as the heir of her husband and not by reason of any vested right she might have in said property by reason of the same having been acquired during the existence of the community.

3. The Supreme Court of the State of California erred in holding and deciding that the interest of the wife in the community property under the Constitution and laws of the State of California was not a vested interest, but that on the death of the husband whatever interest in the community property came to her was as an inheritance from her husband.

4. The Supreme Court of the State of California erred in holding and deciding that an inheritance tax imposed upon the interest of the wife in the community property on the death of her husband is not in conflict with those provisions of the Constitution of the United States which declare that no State shall pass any law impairing the obligation of contracts, and that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, for the reason that the Constitution and the laws of the State of California, under which the property involved in this controversy was acquired, declare that all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property and that upon the death of the husband the wife shall succeed to the one half of said community

property, the other half going to his heirs or subject to his disposition by will.

5. The Supreme Court of the State of California erred in not reversing the order and judgment of the Superior Court of Alameda County in the matter of said estate, and in not giving to Delia Moffitt the one half of the community property of herself and her deceased husband free from any inheritance tax imposed by the statutes of California upon estates derived from deceased owners.

In this appeal the single question is presented: Did Delia Moffitt have a vested interest in one half of the community property of herself and James Moffitt, her husband, during their marriage, as contended by plaintiffs in error?

If she did have such vested interest, there can be no question that the one half of such property received by her upon her husband's death is not subject to collateral inheritance tax.

If she did not have such vested interest, said property is subject to collateral inheritance tax.

Upon behalf of defendant in error, we contend she had no such vested interest.

The entire fabric upon which plaintiffs in error build their argument that Delia Moffitt had a vested interest in said property rests primarily upon the point set out in the fourth specification of error, to wit:

> "That the Constitution and the laws of the State of California, under which the property involved in this controversy was acquired, declare that all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be *common* property," etc.

Plaintiffs in error seek to attach some wizardry to the word "Common" as used in the Constitution of 1849 of the State of California, to show that by its use one half of said property vested in the wife during coverture. The section referred to is as follows:

> Art. XI, Sect. 14: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in *common* with her husband."

That section merely differentiated between a wife's separate property and property she may have had with her husband. It can not be understood to mean that in thus dividing a wife's property into two classes, every manner of holding by her except in severalty, was narrowed down to one manner of holding, since she could in fact have held property in several different ways other than in severalty, such as joint-tenancy, tenancy in common, or as community property. The word "Common," in that section, is simply a general term to cover any and every way in which a wife could hold property other than in severalty, and therefore has no particular bearing upon any questions involved herein.

As admitted by the pleadings in this case, and more particularly pointed out and claimed in the Petition for Writ of Error herein, "All the estate of said deceased (James Moffitt) and his surviving wife is the community property of himself and of

said surviving wife." That being so, we have to discover what "community property" was in the State of California at the time referred to.

The word "Community" is a derivative of the Spanish word "comun," meaning "common"; therefore, we have in English relating to estates in the State of California "common," meaning two vastly different kinds of estates: one, "Tenancy in Common," which was derived by the State of California from the common law of England; the other, "Community Property," which was derived by said State directly from Mexico upon the acquisition of the territory from which California was carved. Mexico accepted the custom upon its conquest by the Spaniards, whose acquisition of the Florida territory resulted in the introduction on American soil of the Spanish *ganancial* system, as it was called. (The history of the custom seems to be best told in the note upon the subject of "Community Property," at page 295, Volume 6, Am. Eng. Ency. of Law, 2d ed.) This manner of holding property therefore came to California from the civil law.

If "held in common" in the Constitution of 1849, as applied to a holding such as involved in the case at bar, refers to the civil law, it is to be interpreted by that system of jurisprudence; but if it be contended that "held in common" had any reference to "tenancy in common" under the common law, we maintain that such was not intended by the Constitution. Such a contention would immediately fall because of

the insurmountable barrier that under the civil law and under the statute law of the State of California "*The entire community property is subject to his (the husband's) debts.*" (Civil Code, Sec. 1402.) That is not the common law doctrine nor the law of the State of California in a "Tenancy in Common."

If Delia Moffitt during coverture had any vested or tangible interest in the community property, or if she had any color of ownership therein, as that word is usually understood, *to take* one cent of her share with which to pay her husband's debts, would be to go contrary to the Constitution of the United States and the Constitution of the State of California, in that it would be "taking property without due process of law." (Constitution of U. S. Art. Fourteen, Sec. 2; Constitution Cal. Art. I, Sec. 13.)

> Cal. Civ. Code, Sec. 1402: In case of the dissolution of the community by the death of the husband, the *entire* community property is equally subject to *his* debts, the family allowance, and the charges and expenses of administration.

Nor could a Probate Court make an order to sell any such property to pay a husband's debts if his wife had any vested interest in the community property.

The California Codes as originally enacted read that:

> "A husband and wife may hold property as joint tenants, tenants in common, or as community property, (Civ. Code, Sec. 161) thus *differentiating* between a tenancy in common and community property."

The Constitution of 1849 does not expressly mention "community property," and we are therefore left to the California statutes for any information regarding it. As a wife's interest in community property is therein expressly provided for, her interest can only be that fixed by statute, and as such a thing as a community interest was unknown at common law, the statute must be interpreted in the light of the origin of such interest.

The Supreme Court of the State of California has from the very creation of the State consistently read the statutes bearing on this question in the light of its origin, and, following the doctrine laid down by the older Spanish writers, has held that during coverture a wife's community interest is a right; that is, but *"feigned"* (*Spreckels* v. *Spreckels,* 116 Cal. 346); "impalpable" (*Fallbrook Irrigation District* v. *Abila,* 106 Cal. 362); "fictitious" (*Spreckels* v. *Spreckels, supra*); "intangible" (*Packard* v. *Arrellanes,* 17 Cal. 539); "nominal" (*Spreckels* v. *Spreckels, supra*); and "mere expectancy" (*Van Maren* v. *Johnson,* 15 Cal. 311). In one of the sister States where this custom prevails it was held:

> "The wife has, during the marriage, no *vested* proprietary interest in any property composing the community, but only an *inchoate* right, which entitles her to the hope or expectation that if she survives her husband she can receive or own one half of the property that may be left after payment of the community debts." (Boyer's Succession, 36 La. Ann. 506.)

In Ballinger on Community Property, the learned writer says:

(Page 29): "The husband has the exclusive administration of the community and may hypothecate or alienate it as he chooses, but he cannot alienate it maliciously and in fraudulent diminution of the *ganancias.* * * * According to Palacios, the reason assigned for the husband's power of disposal of the *ganancias* during marriage, without the wife's consent, is because the husband has the dominion and possession of it in *actu et habitu* during marriage; and the wife only in *habitu* until the marriage is dissolved, when she acquires it equally with her husband. Her interest seems to be a *mere expectancy* during coverture similar to that under the French system."

(Page 36): "All the American States in which the community system prevails have by statutory enactments established the rules for the government of the property rights of the spouses in community. These statutes, in defining what is and what is not community property, have but slightly altered the Spanish law. In fact, they are substantially reënactments of the Spanish-Mexican civil law on the subject of the property rights of husband and wife. In Louisiana, Texas and California they are, for the most part, merely *declaratory of existing laws* saved from the wreck of the Spanish system of jurisprudence formerly in force within these territories."

(Page 328): "The California courts have adopted a narrower and stricter rule than that observed in Texas, and it has tended to dwarf and limit the proprietary rights and interests of the consorts to the extent of divesting the wife of anything more than a *mere expectancy* in the property jointly accumulated."

The first occasion the Supreme Court of the State of California had to pass upon this question at bar was as early as 1 Cal. 515, *Panaud* v. *Jones,* where the doctrine was observed as follows:

"The wife," says Febrero (1 Feb. Mej. 225, Sec. 19), "is clothed with the revocable and feigned dominion and

> possession of one half of the property acquired by her and her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left." But he observes in the next section, "The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *gananciales,* since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, and although they be neither *castrenses* nor *quasi castrenses,* acquired by him, may sell and alienate them at his pleasure, provided there exist no intention to defraud the wife. For this reason, the husband living, and the marriage continuing, the wife can not say that she has any *gananciales,* nor interfere with the husband's free disposition thereof, under pretext that the law concedes the half to her, for this concession is intended for the cases expressed and none other."

The leading and more recent cases decided by the Supreme Court of the State of California upon the question are: "*In re Burdick,* 112 Cal. 393," and "*Spreckels* v. *Spreckels,* 116 Cal. 342." In the latter case it was held:

> "This Court has held after mature deliberation that upon the death of the husband the wife takes one half of the community property as heir. Now all these differences point to the fact that the husband is the absolute owner of the community property * * * The community property is his as absolutely as is his separate estate. Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property; I think it will be universally admitted that so far there has been a complete failure in this respect."

It is conceded, as stated, the property in question was community property; that being so, all intendments, regardless of the use of the word "common"

in the Constitution of 1849, are against the contention that the wife has a vested interest in community property during coverture. That fact is shown by the consistent position assumed by the Supreme Court of California in holding that the husband died *seized* of the community property (*Sharp* v. *Loupe,* 120 Cal. 92; *Cunha* v. *Hughes,* 122 Cal. 112). That fact is further shown by the consistent position assumed by the Supreme Court of California in holding that a wife takes her interest in community property by *succession,* or as an *heir.* (*Van Maren* v. *Johnson,* 15 Cal. 311; *Griener* v. *Griener,* 58 Cal. 119; *Fallbrook Ir. Dist.* v. *Abila,* 106 Cal. 362; *In re Burdick,* 112 Cal. 393; *Packard* v. *Arrellanes,* 17 Cal. 539; *Sharp* v. *Loupe,* 120 Cal. 93; *Spreckels* v. *Spreckels,* 116 Cal. 342.)

To hold with the contention of plaintiff in error that the wife during coverture has a vested interest in community property would be to break down and sweep away practically all of the statutory law of the State of California, in its various ramifications upon this subject, by holding such laws unconstitutional, which would be startling to say the least.

A ready example of this is shown in the *everyday* assignment by an heir of his interest in the property of his ancestor. When the ancestor dies, the assignee takes the interest the heir would have taken. What would the assignee take who had been reckless enough to purchase during the marriage of a husband and wife the wife's half interest in the community

property, in the face of Section 1401 of the California Civil Code holding that "Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband," etc. If the wife died before the husband, the purchaser would take nothing.

If the contention of plaintiff in error that Mrs. Moffitt's interest was vested during coverture be correct, plaintiff in error has, by that very contention, thrown this matter out of court by depriving this Court of jurisdiction. This is a probate proceeding, prosecuted in and appealed from the Superior Court of Alameda County, State of California, sitting as a Probate Court, in the matter of the Estate of James Moffitt, deceased. A Probate Court has jurisdiction of dead men's estates only. If Mrs. Moffitt's interest were vested, upon her husband's death she should have *petitioned the civil side of the court to settle her share of the property in her,* such as in proceedings to terminate a life estate.

Scott v. *McNeal,* 154 U. S. 49.

JURISDICTION TO HEAR AND DETERMINE THIS WRIT OF ERROR IS LACKING.

In the matter of the estate of James Moffitt, decided in the Supreme Court of the State of California, was involved a question of purely local law and the jurisprudence of the State, and no provision of the Constitution of the United States was involved. The point which determined the decision may be

found on pages 360 and 361 of the case as reported in 153 Cal. 359. It was determined that it was a rule of property in California, under our Constitution and statutes and decisions of the Supreme Court of the State of California, that the wife's interest in the community property was a mere expectancy, and that her title to the same did not vest absolutely until after the death of the husband, and that her ownership then arose by the laws of succession of the State of California. As a matter of fact, the constitutionality of the Inheritance Tax Law of March 20, 1905, is not attacked in any particular and can not be attacked, for the only question in the case is as to whether the widow of James Moffitt came under the provisions of that statute, which prescribed that "all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same * * * shall be and is subject to a tax hereinafter provided for." If the widow of James Moffitt obtained her title to the community property during coverture, then the Collateral Inheritance Tax Law did not apply. If she obtained title after the death of her husband, intestate, then the law did apply. Thus, it will readily be seen that the determining point in the case was the question of local jurisprudence as to when her title vested. It was necessary for the Supreme Court of the State of California to construe the Codes and Constitution of the State in order to determine this point, and its construction thereof is binding upon

this Court, even if its construction be different from the construction which might be recognized by this Court.

Smiley v. *Kansas,* 196 U. S. 455;

Armour Packing Co. v. *Lacy,* 200 U. S. 226.

That the question of the vesting of estates is purely one of local cognizance, it is hardly necessary to point out to this Court, and that the Fourteenth Amendment does not affect or control the States in the exercise of their authority to regulate inheritances and to determine the persons or objects upon which an inheritance tax would be imposed, was recently recognized in this Court in

Campbell v. *California,* 200 U. S. 94,

involving the Inheritance Tax Law in question here, wherein the Court said:

> "We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the Fourteenth Amendment compels the States, in levying inheritance taxes, and, *a fortiori,* in regulating inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the Fourteenth Amendment has taken away from the States their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that amendment confines the States absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this court. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S.

283; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562. It is true that in the first of the cited cases it was expressly declared or impliedly recognized that in the exercise by a State of its undoubted power to regulate the burdens which might be imposed on the passage of property by death, a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the States in the exercise of their plenary authority to regulate inheritances and to determine the persons or objects upon which an inheritance burden should be imposed. In this case there can be no doubt, if the right of a State be conceded to select the persons who may inherit or upon whom the burden resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit."

Inasmuch as the determining point in the case is one of purely local cognizance, even though a Federal question may be incidentally involved, this Court will not entertain the Writ of Error.

A Writ of Error from the Supreme Court of the United States to the Supreme Court of a State can be sustained only when the decision is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the State court rests upon independent grounds of law sufficient to sustain it, but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the Writ of Error, and this, even in a case where a Federal question is also decided.

Taylor on Jur. and Pro. of U. S. Supreme Court, Sections 238-240;

Rutland R. R. Co. v. *Central Vermont R. R. Co.*, 159 U. S. 638;
Eustis v. *Bolles*, 150 U. S. 366;
Cal. Powder Co. v. *Davis*, 151 U. S. 393;
Giles v. *Teasley*, 193 U. S. 160;
Sawyer v. *Piper*, 189 U. S. 156;
Harrison v. *Morton*, 171 U. S. 46;
Allen v. *Arguinbau*, 198 U. S. 154;
Chapin v. *Fye*, 179 U. S. 128;
Corkran Oil Co. v. *Arnaudet*, 199 U. S. 193;
Fullerton v. *Texas*, 196 U. S. 192;
Capital Bank v. *Cadiz Bank*, 172 U. S. 425;
Dower v. *Richards*, 151 U. S. 666;
Egan v. *Hart*, 165 U. S. 188;
McMillan v. *Ferrum Min. Co.*, 197 U. S. 343.

It is contended, however, that the obligation of a contract was impaired in the case at bar, because the community property under consideration was acquired under the Constitution of 1849 of the State of California, and the Constitution of 1879 of the State of California changed the law in regard thereto; but this contention was set at rest by the Supreme Court of the State of California in showing that under the Constitution of 1849 the Supreme Court of the State of California had laid down the same rule of property, and that the construction put upon the Constitution of 1849 and the laws passed thereunder is identical with that declared in *Estate of Moffitt, supra.* Such being the case, no Federal question is involved, and the jurisdiction of this Court does not

attach. This point was determined by this Court in two cases:

N. O. Waterworks v. *L. A. Sugar Co.*, 125 U. S. 39;

Kreiger v. *Shelby R. R. Co.*, 125 U. S. 44.

Therein it will be seen that this Court determined that *when the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction*, and that *when the State court gives no effect to a subsequent law but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if subsequent law had not been passed and this Court had no jurisdiction.*

The Court said in the first of the above cases:

> "The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a State court a Federal question must have been expressly or in effect decided by that court, and, therefore, that when the record shows that a Federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the

supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and, therefore, its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law can not be upheld. But when the State court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.

In the present case, the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the State, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the Constitution or any law of the State subsequent to the plaintiff's charter."

The language of this Court, quoted principally from former decisions in *Gulf and Ship Island R. R. Co.* v. *Hughes,* 183 U. S. 75, is pertinent here. Therein the Court said:

"This court has repeatedly held that we can not revise the judgment of the highest court of a State unless, by its terms, or necessary operation, it gives effect to some provision of a State Constitution or law which, as thus construed, impairs the obligation of a precedent contract. In *Railroad Co. v. Rock,* 4 Wall. 177, 181, this court pronounced it a 'fundamental error that this court can, as an appellate tribunal, reverse the judgment of a State court, because that court may hold a contract to be void which this court might hold to be valid.' So, too, in *Knox v. Ex-*

change Bank, 12 Wall. 379, 383, it was said by Mr. Justice Miller: 'But we are not authorized by the Judiciary Act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' To the same effect are *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392, and *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30. In the latter case it is said by Mr. Justice Gray: 'In order to come within the provisions of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.' See, also, *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109."

In the case at bar, there is no law of the State which can be said to have affected the vested right of the applicant for this Writ of Error, but only the judgment of the State court, itself, can be so said to have affected any right of the applicant. And the same claim of a Federal question may be made as to any judgment of a State court.

It appears to us that if there ever arose a case in which the construction of the Supreme Court of the State should be binding upon this Court, such case is presented here, because the determining point of the case involved a question peculiarly within the jurisdiction of the State court, for the inheriting and

vesting of estates is a matter of purely State cognizance.

Respectfully submitted.

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